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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 49.

HENRY O. HOUGHTON, TRUSTEE; GEORGE H. MIFFLIN, J. MURRAY KAY, ET AL., APPELLANTS,

vs.

GEORGE B. CORTELYOU, POSTMASTER GENERAL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 8, 1906.

(20,281.)

(20,281.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 316.

HENRY O. HOUGHTON, TRUSTEE; GEORGE H. MIFFLIN, J. MURRAY KAY, ET AL., APPELLANTS,

vs.

GEORGE B. CORTELYOU, POSTMASTER GENERAL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 5, 1907.

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1 In the Court of Appeals of the District of Columbia.

No. 1607.

GEORGE B. CORTELYOU, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee, ET AL.

Supreme Court of the District of Columbia.

No. 23342. In Equity.

HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. MURRAY KAY, LUCY H. VALENTINE, HENRY O. HOUGHTON, OSCAR R. HOUGHTON, and ALBERT F. HOUGHTON, Complainants,
vs.
GEORGE B. CORTELYOU, Postmaster General.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Bill of Complaint.

Filed May 31, 1902.

Supreme Court of the District of Columbia.

In Equity. 23342.

HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. MURRAY KAY, LUCY H. VALENTINE, HENRY O. HOUGHTON, OSCAR R. HOUGHTON, and ALBERT F. HOUGHTON
vs.
HENRY C. PAYNE, Postmaster General.

To the honorable the supreme court of the District of Columbia, sitting in equity:

Henry O. Houghton, trustee, of Cambridge, George H. Mifflin, of Boston, J. Murray Kay, of Brookline, and said Henry O.
2 Houghton, all in the State of Massachusetts, Lucy H. Valentine, of New York in the State of New York, Oscar R. Houghton, of Riverside in the State of Connecticut, and Albert F. Houghton, of said New York, copartners doing business under the firm and style of Houghton, Mifflin and Company, bring this their bill of com-

plaint against Henry C. Payne, Postmaster General of the United States.

And your orators complaining say:

1. That your orators are each citizens of the United States:

That the respondent is a citizen of the United States holding the office of Postmaster General of the United States.

2. That heretofore and on the seventeenth day of March, 1886, your orators were and ever since have been engaged in the business of printers and publishers of books and periodicals of the Riverside Press in said Cambridge, having their office of publication at four Park street in said Boston, and that said office of publication was and is well known.

3. That as such publishers they are now and since said seventeenth day of March, 1886, have been engaged in printing and publishing a series of periodical publications known and described as "Riverside Literature Series."

That these publications, each and every of them, since said seventeenth of March 1886, to the filing of this bill, have been regularly issued at stated intervals as frequently as four times a year, have borne date of issue, have been numbered consecutively, and have been issued from the known office of publication of your orators hereinbefore set forth;

That these publications, each and every of them, have been formed of printed paper sheets, without boards, cloth, leather, or other substantial binding such as distinguish printed books for preservation from periodical publications;

That these publications, each and every of them, have been devoted to literature, have had a legitimate list of subscribers, and have not been designed primarily for advertising purposes, or for free circulation or for circulation at nominal rates, and your orators in the publication and issue of these publications have complied with all the terms conditions and requirements of the laws of the United States relating to mailable matter of the second class; and your orators file herewith copies of said publications which, in respect to the requirements of mailable matter of the second class, are similar to each and every other of said publications.

4. That of these publications already issued Nos. 1-18 were issued weekly to July, 1886, Nos. 19-42 monthly to April, 1889, Nos. 43-62 quarterly to April, 1894, Nos. 63-116 semi-monthly to May, 1897, Nos. 117-143 monthly to May, 1900, Nos. 144-151 quarterly to April, 1902. That from said March 17, 1886, to the filing of this bill these publications have been recognized, entered and admitted by the successive Postmaster Generals of the United States as mailable matter of the second class, and have been conveyed in and by the mails of the United States at the rates prescribed for mailable matter
3 of the second class, the last certification thereof being upon the change to a quarterly issue in the year 1900, and being as follows:—

3505.

Certificate of Entry of Publication as Second Class Matter.

POST OFFICE AT BOSTON, *Sept.* 15, 1900.

I hereby certify that the Riverside Literature Series, a quarterly published at this place, has been determined by the Third Assistant Postmaster General to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it as such is accordingly made upon the books of this office. Valid while the character of the publication remains unchanged, or until revoked.

GEORGE A. HIBBARD, *Postmaster,*
By C. C. MANSFIELD, *Ass't P. M.*

And your orators further allege that the entry and admission of these publications as mailable matter of the second class was not made upon false evidence, and that since their first admission in March, 1886, until the filing of this bill there has been no change in their character except as to interval of issue as hereinbefore set forth.

5. That on April 4, 1902, the following notice was received by your orators:

OFFICE OF THE POSTMASTER,
BOSTON, MASS., *April* 4, 1902.

Messrs. Houghton, Mifflin & Co., pub. of "Riverside Literature Series," 4 Park St., Boston, Mass.

GENTLEMEN: You are respectfully informed that I am directed by the Third Assistant Postmaster General to inform you that opportunity is given you to show cause why your publication (the Riverside Literature Series) should not be denied second class rates of postage under the provisions of section 276, Postal Laws and Regulations, (a copy of which is enclosed), on the ground that your publication has the characteristics of books.

The department informs me that the hearing may take place at this office or at the department at Washington,—preferably at this office. All arguments, statements and evidence submitted by you must be in writing, and this office is instructed that all arguments, evidence etc., must be submitted to the department by April 22.

If you desire to be heard at the department at Washington you will have to make an appointment with the Third Assistant Postmaster General.

Respectfully. GEO. A. HIBBARD, *Postmaster.*

4 (Copy enclosed.)

OFFICE OF THE POSTMASTER GENERAL,
WASHINGTON, D. C., *July* 17, 1901.

Order No. 898.

Section 276, Postal Laws and Regulations, edition of 1893, is hereby amended to read as follows:

SEC. 276. General definition.—Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in section- 12 and 14. (Act of March 3, 1879, sec. 10, 20 Stats., 359.) The sections referred to are 293 and 277. Second class matter above described is of two kinds: (1) That sent by publishers or news agents. (Section 299) (2) That sent by others than publishers or news agents. (Section 302). "Periodical publications" herein referred to are held not to include those having the characteristics of books, but only such as consist of current news or miscellaneous literary matter, or both (not excluding advertising), and conform to the statutory characteristics of second class matter.

CH. EMORY SMITH,
Postmaster General.

6. That evidence and argument that these publications should not be denied second class rates on account of their having characteristics of books were submitted in compliance with said notice.

That on May 5th, 1902, the following notice was received.

OFFICE OF THE POSTMASTER,
BOSTON, MASS., *May* 5, 1902.

Houghton, Mifflin — Company, 4 Park St., Boston, Mass.

GENTLEMEN: In relation to your publication, the Riverside Literature Series, for which you were requested to submit evidence and arguments to show why it should not be denied second-class rates on account of its having characteristics of books, I have to inform you that your evidence was submitted to the Third Assistant Postmaster General as requested by his letter of April 2nd, and in answer thereto I have received notice to inform you that your certificate of entry giving you permission to mail the Riverside Literature Series at second-class rates is cancelled. You are further notified that hereafter it will be unlawful to print in the Riverside Literature Series a statement of entry, and that when it is offered for mailing in the future, whether by you, news agents or others, postage will have to be prepaid thereon at the third-class rates by affixing stamps thereto.

Respectfully, GEO. A. HIBBARD, *Postmaster.*

P. S.—The reason for exclusion is, failure to establish that your publication comes within the provisions of the postal laws and regulations for acceptance in the mails as second-class matter.

5 That on May 8th, 1902, the foregoing order was suspended by order of the Postmaster General until further notice.

That on May 22nd, 1902, the following notice was received by your orators:—

OFFICE OF THE POSTMASTER,
BOSTON, MASS., *May* 22, 1902.

Houghton, Mifflin & Company, 4 Park street, Boston, Mass.

GENTLEMEN: In the relation to your request of May 21st asking for extension of time for the Riverside Literature Series, I have to inform you that under permission granted by the Third Assistant Postmaster General, that you will have until May 31st to mail your publication in, and the date of exclusion will be May 31st.

Respectfully,
(Signed) GEORGE A. HIBBARD, *Postmaster.*

And your orators, on information and belief declare:

That on May 31st, 1902, these publications will be excluded from the mails, in accordance with the foregoing orders of the Postmaster General.

7. That the cancellation of the certificate of entry giving permission to mail such publications at second class rates on account of their having the characteristics of books declared by the respondent was unlawful.

That the exclusion of these publications from the mail as mailable matter of the second class, if put in force on May 31, 1902, as now threatened, will cause your orators great pecuniary loss and damage, both in the advanced rates demanded and in the necessary reorganization of its business in distributing these publications of which during the past year upwards of five hundred thousand copies were sent through the mails, all of which increase in rates and charges will have to be borne by your orators in those cases where existing contracts require it.

8. That your orators are liable, under existing contracts, to supply upwards of two million copies of these publications at a price based upon the postage rates chargeable upon them as mailable matter of the second class.

9. That the action of the Postmaster General in excluding these publications from the mails and denying to them the privilege of mailable matter of the second class, as hereinbefore set forth, is a reversal of and contrary to the practice sanctioned by him and his predecessors in office in regard to these particular publications extending over an unbroken period of sixteen years.

That the right to have these publications carried in the mails as mailable matter of the second class, and which has been accorded to your orators by the action of the Postmaster Generals, is a valuable property right exceeding in value the sum of five thousand dollars.

6 For as much as your orators are without a plain, adequate and complete remedy at law, and because if remediable at law relief could not be obtained by a multiplicity of suits, your orators pray:

First. That your orators may be declared to be entitled to have these publications entered, received and transmitted through the mails, as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879.

Second. That it may please the court to grant an injunction restraining the respondent from enforcing the cancellation of the certificate of entry set forth in paragraph six of this bill, and requiring him to receive said publications and transmit the same through the mail as mailable matter of the second class, in accordance with the provisions of said act of Congress approved March 3, 1879.

Third. For such other and further relief as, under the facts stated, your orators may be entitled — and in equity may seem meet.

Fourth. And your orators pray also for a preliminary injunction, and that your honors will grant a writ of subpœna directed to said respondent, requiring him to answer this bill, but not under oath, an answer under oath being hereby expressly waived, and show cause why the prayers of this bill should not be granted.

GEORGE H. MIFFLIN,
HENRY O. HOUGHTON, *Trustee,*
J. MURRAY KAY,
LUCY H. VALENTINE,
OSCAR R. HOUGHTON,
ALBERT F. HOUGHTON,
By HOLMES CONRAD AND
LEIGH ROBINSON, *Their Sol'rs.*

UNITED STATES OF AMERICA, *State of Massachusetts:*

BOSTON, *May* 27, 1902.

On this twenty seventh day of May, 1902, personally appeared George H. Mifflin who being by me duly sworn, deposes and says that he is one of the complainants within named; that he has read the foregoing bill of complaint subscribed by him, and knows the contents thereof, and that the same is true except as to the matters therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

Sworn to and subscribed before me this twenty seventh day of May, 1902.

JOHN ABBOTT,
[SEAL.] *Notary Public.*

COMMONWEALTH OF MASSACHUSETTS, *Office of the Secretary:*

BOSTON, *May* 27, 1902.

I hereby certify, that at the date of the attestation hereto annexed John Abbott was a notary public, for the said Commonwealth,
7 duly commissioned and constituted, that as such notary public, he was by law authorized to administer oaths and take acknowledgments of deeds and other instruments throughout the Commonwealth; that to his acts and attestations, as such, full faith

and credit are and ought to be given in and out of court; and that I believe the signature to the annexed attestation to be genuine.

In testimony of which, I have hereunto affixed the seal of the Commonwealth the date first above written.

[SEAL.] WM. M. OLIN,
Secretary of the Commonwealth.

Restraining Order.

Upon the complainant filing undertaking as required by equity rule 42, the defendant will be hereby restrained as prayed in the within-mentioned bill, until further order, to be made, if at all, after a hearing, which is fixed for the 16th day of June at 10 o'clock a. m. 1902, of which take notice.

By the court:

A. B. HAGNER, *Justice.*

Attest:
J. R. YOUNG, *Clerk, etc.,*
By R. J. MEIGS, JR.,
Ass't Clerk, etc.

Memorandum.

May 31, 1902.—Injunction undertaking—filed.

Answer of Defendant.

Filed October 15, 1902.

In the Supreme Court of the District of Columbia.

Equity. No. 23342.

HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. MURRAY RAY, LUCY H. VALENTINE, HENRY O. HOUGHTON, OSCAR R. HOUGHTON, and ALBERT F. HOUGHTON, Complainants,
vs.
HENRY C. PAYNE, Postmaster General, Defendant.

Answer of the Defendant, The Postmaster General, to the Bill of Complaint of the Above-named Complainants.

The defendant, now and at all times hereafter saving and reserving to himself all and all manner of benefit or advantage of
8 exception that may be taken to the said bill for the many errors, uncertainties and imperfections thereof, for answer thereto, or to so much thereof as he is advised that it is necessary or material for him to make answer unto, answering, says:

I–II. The defendant is informed and believes that the allegations of the first two paragraphs of said bill are true.

III. For answer to the third paragraph, the defendant says that the publications of the complainants designated as the "Riverside Literature Series" do not constitute a periodical publication within the intent and meaning of the statue of the United States defining the various classes of mailable matter. On the contrary, the defendant avers that although said publications are regularly issued at stated intervals from the known office of the complainants, and are formed of printed paper sheets, without board, cloth, leather or other substantial binding, and as in said paragraph set forth, thus comply with the external characteristics and conditions of the second class of mail matter, nevertheless *internally and in substance,* they have not the characteristics of said second class of mail matter, but have the characteristics of books, and are in fact books, which by law are included in the third class of mail matter; and further, that said publications have not the characteristics of said second class of mail matter, in that they have no true relation or connection one with another so as to constitute them a periodical within the intent of the law, but each publication, issue, or so-called number, is in truth a separate reprint, unaltered and unabridged, of what previously has been published confessedly as a book or as a part of a book; and defendant further avers that the complainants have been in the practise, whenever the reprint was of greater volume than usual, of calling such a publication a double, triple, quadruple or quintuple number, as the magnitude of the publication might require, and of charging therefor twice, thrice, four or five times the usual price, as the case might be.

And the defendant further avers that the said several reprints follow one another quarterly, without order or system, in such manner as to form a wholly disconnected and varied succession of distinct pieces of reading matter in biography, poetry, essays, literary and descriptive, natural history and mythology; and that the only connection between the successive reprints consists in the mere fact that over the title of the publication or particular reprint are printed the words "Riverside Literature Series," and that the said reprints are numbered successively; and the defendant further avers that the complainants have been in the practice of printing, under the said style of the "Riverside Literature Series," so-called extra numbers designated not by numbers but by letters of the alphabet, which said extra numbers are of the same kind and nature and in all respects similar to the periodically published numbers or issues which are numbered successively; all of which will appear by an examination of the copies of such publications filed with the said bill and with this answer as a part hereof (marked Exhibits A, B, C,
9 D, E and F), as well as by an inspection of the titles of the different numbers as the same are printed upon the cover of each of said copies.

And in further denial of the allegation that said several reprints published under the style of the "Riverside Literature Series" constitute a periodical publication within the meaning of the act of March 3, 1879, the defendant says that the said reprints are sold by the complainant as separate publications, complete in themselves,

and are designed, and used, as text-books for the study of literature, and the same are likewise sold at a reduced rate for 10 or more copies of the same publication, and also at a further reduced rate of 100 or more copies of the same publication, and the same publication- bound in linen covers, without other or further change, are confessedly sold as books; all of which facts will more at large appear by reference to the printed announcement, catalogue or advertisement of said series issued by the complainants and annexed to this answer marked Exhibits G and H, and prayed to be read as a part hereof.

IV. The defendant is informed and believes that the allegations of the fourth paragraph are true.

V. The defendant admits the allegations of the fifth paragraph.

VI. The defendant admits the allegations of the sixth paragraph, with the exception of the allegation that in accordance with the orders therein mentioned the said publications will be excluded from the mails, and this he denies; he avers on the contrary the only effect of such orders will be to require the payment of postage at the third class rate instead of the second class rate, and he further says that it was his duty to examine into all the facts and circumstances which determine whether or not such publications do now in fact comply with the statutory conditions for acceptance at said second-class rate; and that, as a result of the inquiry into the facts and circumstances, upon the hearing aforesaid, this defendant, acting through the Third Assistant Postmaster General has found said publication not to be entitled to admission to the mails at the second-class rate; and that it is his intention, in pursuance of such finding, unless restrained by this court, hereafter not to admit said publications to the mails at such second class rate.

VII. Answering the seventh paragraph as well as answering generally to the whole bill, the defendant says that, as Postmaster General of the United States, he is charged by law with the duty of superintending generally the business of the Post Office Department and of executing all laws relative to the postal service. That among his duties is that of classifying the mail matter offered for transmission through the United States mail and distributing the same into the respective classes created and designated by Congress; in course of which classification it becomes incumbent upon him to investigate and ascertain whether matter transmitted as second class matter does or does not comply with the conditions upon which the law permits publications to be admitted to the second-class rate, that such investigation, exercised by this
10 defendant as the head of an executive department in the ordinary discharge of his duties, requires an inquiry into facts, an examination of evidence and an interpretation of law; and that in the case of the publication hereinbefore mentioned, after notice to the complainants, a full, fair and impartial hearing, and an inquiry into the facts relevant and material to the inquiry, an examination of evidence and a construction of the law and application thereof to the facts, the defendant found and determined that said publications now offered for transmission, not having the statutory characteristics of second-class matter but on the contrary

the characteristics of third-class matter, and not fulfilling the conditions established by law for second-class matter, were not entitled to admission to the mails at the second-class rate, and that the certificate permitting such admission should for that reason, be revoked and become inoperative in the future; which said finding, determination and decision involved the exercise of judgment and discretion on the part of this defendant, and the Third Assistant Postmaster General acting in that behalf; and for that reason, as defendant respectfully submits, is not subject to be reviewed by this honorable court.

And this defendant further says that said certificate of entry was not cancelled, nor were the said publications refused admission to the second-class rate, by reason of any matter, thing, principle, rule or statement contained in the amendment to section 276 issued on July 17, 1901; but upon the sole ground that the said publication, by reason of the characteristics hereinbefore set out in the third paragraph of this answer, do not constitute a periodical publication within the intent and meaning of the act of March 3, 1879; but the said publication, and each and every of them, is a distinct and separate publication, complete in itself, not forming an integral part, issue or number of a regular periodical, but each and every of them is within the intent and meaning of the terms "books, transient newspapers and periodicals" as the same are employed in said act to define and designate mailable matter of the third class; miscellaneous printed matter.

VIII. The defendant can neither admit nor deny the allegations of the eighth paragraph, and submits that the same are wholly irrelevant and immaterial; but for anything the defendant knows to the contrary the same may be true as stated.

IX. In answering to the ninth paragraph, the defendant admits that his action in excluding the said publications from the privilege of the second class rate is contrary to the practice of his predecessors who for sixteen years admitted similar publications under the same general name to the privilege of that rate; but the defendant further says that the admission and transmission of mailable matter under the terms prescribed by the statutes is a continuous administrative act, the performance of which is devolved by law upon this defendant, and that the defendant in the performance of this duty is in no wise bound or controlled by the action of his predecessors, nor does

11 the admission and transmission by one Postmaster General of mailable matter of a certain kind at the second or any other particular rate constitute any obligation, contractual or otherwise, upon the United States or its officers thereafter to admit similar publications under the same name at such particular rate.

Defendant is further advised, and so believing, avers, that the privilege of having publications, which comply with the conditions of second class matter as defined in the act of March 3, 1879, transmitted at the second class rate is not a property right; and that whether publications do so comply with such conditions is a matter wholly within the competence and jurisdiction of the Postmaster

General, and the determination of which is within the judgment and discretion of the Postmaster General for the time being.

And the defendant respectfully submits that complainants in and by their said bill and the matters and things set forth therein do not make or state such a case as would entitle them to the relief thereby prayed; and as to so much of the said bill as prays an injunction against the enforcement by this defendant of his decision that the said publications are not entitled to transmission at second-class rates, this defendant submits that it is against the course and practice and not within the jurisdiction of this court to interfere with, review or afford relief against the decision and action of the head of an executive department in a matter involving the exercise of his judgment and discretion; and defendant hopes he will have the same benefit of these defences as if he had formally demurred to the said bill upon the ground thereof. And having fully answered, the defendant prays to be hence dismissed with his reasonable costs.

EDWIN C. MADDEN,
Acting Postmaster General.

ASHLEY M. GOULD,
HENRY H. GLASSIE,
Solicitors for the Defendant.

DISTRICT OF COLUMBIA, *ss:*

Edwin C. Madden, acting Postmaster General, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof, and the matters and things therein set forth he knows to be true save those stated upon information and belief, which he believes to be true.

EDWIN C. MADDEN,
Acting Postmaster General.

Subscribed and sworn to before me this 12th day of September, A. D. 1902.

THOS. E. ROACH,
[SEAL.] *Notary Public.*

12 *Replication.*

Filed February 4, 1903.

In the Supreme Court of the District of Columbia.

Equity. 23342.

HENRY O. HOUGHTON ET AL.
vs.
HENRY C. PAYNE, Postmaster General.

The complainants hereby join issue upon the answer of the defendant and will hear the cause on bill and answer against the defendant.

HOLMES CONRAD,
Solicitor for the Complainants.

Stipulation.

Filed February 4, 1903.

In the Supreme Court of the District of Columbia.

Eq. 23342.

HOUGHTON ET AL.
vs.
HENRY C. PAYNE, Postmaster General.

It is hereby stipulated by and between the solicitors for the respective parties that reference may be made at any hearing of this cause to all or any of the issues of the complainant press published under the designation of the Riverside Literature Series:—and that the cause may be heard at this term.

HOLMES CONRAD,
Solicitor and Counsel for the Complainants.
MORGAN H. BEACH,
HENRY H. GLASSIE,
Solicitor- and Counsel for the Defendant.

Decree.

Filed March 10, 1903.

In the Supreme Court of the District of Columbia.

In Equity. No. 23342.

HENRY O. HOUGHTON and Others, Complainants,
vs.
HENRY C. PAYNE, Postmaster General.

This cause coming on to be heard upon the bill and the exhibits filed therewith and on the papers filed in the cause and the
13 proceedings had therein, was argued by counsel. On consideration thereof it is this 10th day of March, 1903, adjudged, ordered and decreed,

1. That the complainants are entitled to have their publications entitled "Riverside Literature Series," received and transmitted through the mails, as mailable matter of the second class, as defined by the act of Congress approved March 3, 1897.

2. That the Postmaster General be, and he is hereby perpetually restrained from enforcing and continuing the cancellation of the certificate of entry set forth in paragraph six, of said bill, and from refusing to receive said publication and transmit the same through the mails, as mailable matter of the second class, in accordance with the provisions of said act of Congress approved March 3, 1879, and

from denying to the complainants the receipt, entry and transmission through the mails of their publication, entitled "Riverside Literature Series," as mailable matter of the second class as defined by the act of Congress approved March 3, 1879.

3. That the complainants do recover of the defendant their costs incurred in this suit, and may have execution therefor according to law.

A. B. HAGNER,
Asso. Justice.

And the defendant in open court by direction of the Post Office Department and acting under that direction, prays an appeal to the Court of Appeals which is hereby allowed.

A. B. HAGNER.

Opinion of the Court.

Filed March 16, 1903.

In the Supreme Court of the District of Columbia.

Equity. No. 23342.

HENRY O. HOUGHTON, Trustee, ET AL.
vs.
HENRY C. PAYNE, Postmaster General.

Justice HAGNER:

By the act of March 3, 1879, (20 Stats., 358) Congress revised the then existing classification of mailable matter, and fixed specific rates of postage to the respective classes thereby established; which were thus described:

"SEC. 7. Mailable matter shall be divided into four classes:

First. Written matter;

Second. Periodical publications;

Third. Miscellaneous printed matter;

Fourth. Merchandise."

14 Matter of the second class was thus described:

"SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections twelve and fourteen."

SEC. 11. Publications of the second class (except as provided in section 25) shall be entitled to transmission through the mails at two cents a pound or fraction thereof."

"SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject:

Provided, That nothing herein contained shall be so construed as

to prohibit the insertion in periodicals of advertisements attached permanently to the same."

"SEC. 12. That the conditions upon which a publication shall be admitted to the second class are as follows:

First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers;

Provided, however, That nothing herein contained shall be so construed as to admit to the second class rate regular publications, designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

And by the act of March 3, 1885 (23 Stats. 385), it was provided that second class matter (except as to that excepted in section 25) shall, on and after June 1, 1885, be entitled to transmission through the mails at one cent a pound or fraction thereof.

Section 17, declared that mail matter of the third class shall embrace books, transient newspapers and periodicals, circulars, etc., and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof.

The difference between these rates and those prescribed by the act of 1885 for second class postage is very great, and from that circumstance doubtless grew the difficulty which this suit was intended to settle.

Up to the year 1886 no postal regulations had been issued by the authorities restrictive of the construction which had been adopted and continuously followed by the Post Office Department as to the description of mailable matter entitled to be carried as "second class;" and although Congress in 1885 had reviewed and re-
15 duced the rate of that matter very greatly, it had abstained from all restriction of the character of matter that should enjoy the benefit of the reduced rate.

In this state of the law and the postal regulations, the complainants, book-sellers and publishers at Boston, commenced the issue of publications which they called the "Riverside Literature Series." They applied for and received from the Boston post office from time to time the certificate in the form issued by the Postmaster General then in office, declaring their publications entitled to admission into the mails as "second class matter;" and, in accordance with the instructions of the Government officials a notice to that effect was printed on the outside of such publications. The last of these certificates bore date of the 15th of September, 1900.

On the 4th of April, 1902, nearly two years after this last certificate was issued, the complainants were notified by the postmaster

at Boston to show cause why they should not be denied second class rates of postage, under sec. 276, Postal Laws and Regulations, dated the 17th of July, 1901, on the ground that their publication had the characteristics of books; and they were warned that on the 22nd of April all arguments, evidence, etc. bearing on the subject must be laid before the department. Evidence and arguments were accordingly submitted by the complainants to the Third Assistant Postmaster General, and on the 5th day of May, 1902, they were informed by the postmaster at Boston that their said certificate of entry was canceled, and that thereafter their publications should be prepaid as third-class matter. The reason given for the exclusion being "failure to establish that your publication comes within the provisions of the postal laws and regulations for acceptance as second class matter."

By a subsequent notification the complainants were informed that the time of exclusion of their publication was extended to the 31st of May, 1902. On this last day, the bill before the court was filed against the Postmaster General, which prayed the court to declare: 1st. That the complainants are entitled to have their publication entered and transmitted through the mails as second class matter. 2nd. For an injunction to restrain the cancellation of the certificate of entry of September 15, 1900, by that official, and requiring him to receive and transmit their publications as mailable matter of the second class,—and for further relief.

The carefully prepared answer of the Postmaster General denies: First. That the Riverside Literature Series constitutes a periodical publication within the intent and meaning of the statute defining the classes of mailable matter; that, although complying *with the external characteristics and conditions of the second class of mail matter, nevertheless, internally and in substance they have not the characteristics of second class matter, but have the characteristics of books, and are in fact books;* and the answer proceeds at length to point out the various grounds of this discrimination.

He next insists that it is his official duty to arrange the
16 mail matter into the classes created and designated by Congress; that after notice to the complainants and a full and impartial hearing of evidence be found and determined, in the exercise of judgment and discretion, that the publications of the complainants were not entitled, under the conditions prescribed by law, to be admitted as second class matter; and that such finding and determination are not subject to review by this court.

Admitting his action in excluding said publications from the privileges of second class matter is contrary to the practice of his predecessors, who for sixteen years admitted similar publications to the privileges of that rate, the Postmaster General insists that the admission and transmission of mailable matter under the terms prescribed by the statute is a continuous administrative act, the performance of which is devolved by law upon this defendant, and that the defendant in the performance of this duty is in no way bound or controlled by the action of his predecessors.

And finally, that the admission of mail matter at a certain rate

constitutes no contractual obligation upon the United States or its officers, and that the privilege of having publications admitted at any particular rate is not a property right; and whether they do comply with the conditions and requisites for admission is a question wholly within the competence of the Postmaster General, and within the judgment and discretion of that official for the time being.

1. The question of the jurisdiction of this court to determine the case is first to be considered.

That this court possesses the general jurisdiction to award an injunction or a mandamus against the highest officers of the Government in a proper case cannot be denied. When Chief Justice Marshall in 1802 in Marbury *v.* Madison, 1 Cranch, 171, said:

"It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."

he was but stating what was afterwards uttered by the highest court of England, in Ellis *vs.* The Lords of the Treasury, 6 Simons, 214, where the vice chancellor issued an injunction, enjoining those officials from paying money to an official of the exchequer.

In 25 Maryland, Magruder *vs.* Swann, governor, the court of appeals ordered a mandamus against the governor.

In the argument in U. S. *vs.* Kendall, Postmaster General, Attorney General Butler admitted that the President himself was amendable to a mandamus to require the performance of a ministerial duty.

I have no idea that under our law, an order of the Postmaster General excluding a class of publications from certain privileges of the mail service because, according to his construction of a statute they are not entitled to those privileges, is to be regarded as the exercise of such official discretion as prevents the examination by this court of the question whether that official's construction of the law is the correct one.

17 The decisions of the most recent Postmaster General can be no more impeccable or free from criticism than those of his predecessors, for he can have no more official authority than his predecessors. Indeed, as between variant decisions on the same subject, by persons holding the same office in succession, there should be rather an inclination by the courts to sustain the earlier judgment, especially where it has followed for a considerable time by successive officials; as was suggested in Decatur *vs.* Spaulding, 12 Peters; Warder *vs.* Chandler, Secretary of the Navy, 2 Mackey, 527.

In U. S. *vs.* Alabama Railroad, 142 U. S. 621, it appeared the act of Congress of 1876, ch. 179, sec. 13, declared that where a railroad built by Government aid claimed compensation for carrying the mails, it should receive but 80 per cent. of the usual rates. In the same year 1876, in which this law was passed, it was decided by the Postmaster General then in office, that if part of a railroad had been constructed without any such Government aid, it had the right to demand the full rates over the portion thus built by private subscriptions: and payment according to this decision had been fol-

lowed by six different Postmasters General from 1876 to 1885. In the latter year, the Postmaster General then in office, reviewing the act of 1876, reversed the construction given to it by his predecessors, and reduced the allowance over that part of the road which had not been constructed from the land grants. It appears in the decision that this construction was given not on account of any mistake of fact in the original orders under which payment had been made, but upon the ground of a supposed error of law in the interpretation of the section involved. The Supreme Court reversed this decision, and speaking by Mr. Justice Brown said:

"We think the contemporaneous construction thus given by the executive department of the Government and continued for nine years, through six different administrations of that department—a construction which though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be decisive in this suit. It is a settled doctrine of this court, that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction, may be prejudiced."

And the court overruled the decision of the last Postmaster General and reinstated that of his predecessor made nine years before.

Applying the suggestion made in this case to the case before us, it appears that between the passage of the act of March 3, 1879, and the cancellation of the last certificate in 1903, twenty-three years had intervened, during which eleven administrations of the Post Office Department had in turn been charged with the construction of the act; and during sixteen years of this period the complainants had been acting under the rule prescribed contemporaneously with
18 the passage of the law; that Congress at twenty-three sessions had in turn examined the affairs of the postal service, at some of which sessions there had been made various changes connected with the matter in hand. During this time repeated suggestions had been made by different Postmasters General to amend the law so as to exclude the class of mail matter here in controversy from the second class rates; and this upon the earnest representations that the unwise liberality existing was responsible for the deficit in the post office revenues; and these recommendations had been examined by successive committees of both Houses, which had supported them in voluminous reports; with the result that Congress refused to make the changes so recommended; and so this contemporaneous construction remained undisturbed until the action taken in 1902, which is now under consideration.

There is no special power given to the Postmaster General to prescribe regulations at variance with an act of Congress. Section 161 of the Revised Statutes has been referred to as having some bearing upon the point, but this applies equally to all heads of departments. It is in these words:

"The head of each department is authorized to prescribe regula-

tions, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it."

But this section specially provides that such regulations are not to be *inconsistent with law;* and the matters which may be embraced in the regulations thus authorized to be made are very different in character from those under examination.

There are several provisions of the Revised Statutes committing particular powers to the Postmaster General which are of such comparatively unimportant character as to indicate that special care had been observed to limit that officer even in affairs of minor importance. Thus, by sec. 3907 Congress took the pains to empower him to provide by regulation for carrying small newspapers issued less frequently than once a week; and under sec. 3909 to prescribe by regulation as to the form of affidavit to be taken by the publishers of a newspaper.

In comparison with the large powers now claimed of interpolating into the act of 1879 limitations and conditions not set forth in it, these minor grants of power appear very insignificant. It is strange it should have been thought important to provide specially for such trivialities, if the great powers claimed as to the matter in hand were already appurtenant to the office. Indeed, it may be asked why the entire subject of postage rates and arranging the classification should not have been left bodily to the Postmaster General, if the general power now claimed was clearly given by the law.

In the case of U. S. *vs.* Kendall, 3 Cranch, C. C. R., Mr. Kendall's claim as Postmaster General of power inherent in the office
19 which justified him to construe an act of Congress so as to refuse to enter a credit on the books to Stockton & Stokes directed by law, received no support from the courts, and he was peremptorily ordered to comply with the provisions of the statute, his own opinion of the justice of the credit to the contrary. As Mr. Kendall's contention was based upon a supposed error of law in construing the statute in favor of the claimant in that cause, the court, upon the principle declared in U. S. *vs.* Alabama Railroad, above cited, exercised the power of examining it on the propriety of his decision.

Its right to do so has been recently declared in the case of The American School of Magnetic Healing *vs.* McAnnulty, to appear in 187 U. S. 94. In that case the Postmaster General decided that the Magnetic Company was within the meaning of sec. 3929 R. S., which authorized him, upon satisfactory evidence that any person — was engaged in conducting any fraudulent lottery or any other scheme or device for obtaining money by false pretences, to instruct postmasters to return to the sender all registered letters directed to such person, with the word "Fraudulent" stamped on the outside, and otherwise to refuse to assist in the circulation of letters for such person. The Postmaster General issued such an order to McAnnulty, the postmaster at the town of Nevada, Missouri. The supreme court held that the fact that the decision of that official upon which his

order was based was made only after summons and hearings (as has been allowed in the controversy at bar) did not affect the case.

In reply to the inquiry whether Congress has entrusted the administration of such statutes wholly to the discretion of the Postmaster General to such an extent that his determination is to be held conclusive upon all questions arising under them, the court said, that although the conduct of the post office is a part of the administrative department of the Government, "that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of the department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."

The court, after examining the entire case, held that upon the admissions of the demurrer the decision of the Postmaster General was not authorized by the statute, and his order "being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant. * * * In such a case as the one before us, there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts, and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, yet such decision, being a legal error, does not bind the courts."

The court concludes that "simply holding that the admitted facts show no violation of the statutes cited above, but an erroneous order given by the Postmaster General to defendant, which the courts have power to grant relief against, we are constrained to * * * grant the temporary injunction as applied for by complainants."

In recognition of this decision the District Court of Appeals very recently affirmed the decree of Justice Bradley in the case of Postmaster General *vs.* The National Railway Publication Company, which held an order of that official denying the privileges of second class postage rates to a publication called "The Official Guide of the Railways, etc.," generally known as the Travellers' Official Guide, was erroneous. The able opinion of the Court of Appeals in that case clearly shows that the department erred in holding the publication there referred to was not entitled to be rated as second class matter upon the case presented by the record; and I regard it as conclusive of this branch of the case.

II. It being clear that this court has the power to inquire into the validity of the decision of the Postmaster General the question remaining for consideration is whether, under a proper construction of the act of 1879, the Riverside Literature Series is entitled to the benefit of the second class rates.

The Postmaster General in his answer, as we have seen, admits

that although the publications "comply with the *external characteristics and conditions of second class matter, nevertheless internally and in substance* they have not the characteristics of second class mail matter, *but have the characteristics of books, and are in fact books.*"

The requirements expressed in the law to entitle the admission of mail matter to the privileges of second class rates are nine in number, and under the discrimination of the answer must, with one exception, be designated as "*external.*" They require (1) there should be a *periodical* issue (2) *stated intervals,* (3) as frequently as four times a year; (4) they must bear the date of the issue; (5) be numbered consecutively; (6) be issued from a known office of publication; (7) formed of printed paper sheets, (8) without board, cloth, leather, or other *substantial binding,* such as distinguish printed books for preservation from periodical publications, and (9) must have a legitimate list of subscribers. The only requirement expressed in the law which can be termed "internal" is that contained in provision fourth of section 14, which requires these publications "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry."

It is, of course, beyond the power of the Postmaster General by direct order to add another to the list either of *external* or *internal* requirements. Congress, of course, might have done this,
21 either originally when it passed the law or at any time after its passage, since it possesses full powers of legislation in that direction. But this it has steadily refused to do. By such legislation it might have doubled or multiplied in still larger ratio the postage rates on publications precisely like that before us; or still further reduced it. But no branch of this Government except the legislature possesses such powers; and yet that is precisely what the Postmaster General would effectually accomplish by the new regulation of 1901, with respect both to the external and to the internal requirements, if it were sustained. For example, the third division of section 14 is the only paragraph which refers to "books" in connection with the requirements of second class matter, and all it there enjoins is that the periodicals of that class must not have *substantial bindings* "such as distinguish printed *books for preservation* from periodical publications." The bindings of the publications therein described are not those of *all* books, but only of such books as are "*bound for preservation.*"

But the Postmaster General's order of July, 1901, includes all publications "having the *characteristics of books,*" without regard to whether they are books "*bound for preservation*" (which implies reasonable strong binding); or only for temporary use, in the flimsiest or most perishable manner; or not bound at all. There are other "characteristics of books" besides their bindings, and the monthly magazines, such as the Century and Scribners', admittedly second class matter, possess many "*characteristics*" of ordinary books, besides those of opera books, note books, bank books, etc., etc., which are never or very seldom bound. Thus the order makes this *external* requirement more rigid and narrow than the statute had done.

The original *"internal"* provision, embraced in the fourth division of section 14, as passed by Congress, contained no requirement that the periodical publications to be entitled to second class rates shall *only* include such as *"consist of current news or miscellaneous literary matter, or both."* But the Postmaster General's order *superadds* this qualification to those which Congress had theretofore determined to be sufficient, and had so declared in the statute passed nearly a quarter of a century ago.

Of course, this provision must have been designed to *add new conditions* to the existing enumeration; otherwise, it is without meaning at all (which we cannot assume), and should not have been introduced to perplex and give needless trouble. Religious magazines, or publications specially for architects, physicians, lawyers, electricians, mathematicians, chess-players, dressmakers, etc., etc., must add "current news or miscellaneous literary matter," to their contents under peril of exclusion from the second class rates. The case of the Railroad Guide, decided by the Court of Appeals, is an unanswerable illustration of this point.

These changes I think the Postmaster General was without power to make, and his order, in these respects, as to the case before
22 me, was the consequence of an inaccurate construction of the statute, and should, therefore, be declared illegal and void.

Much stress was laid in the able argument on behalf of the Postmaster General, upon the fact that one of the publications filed as an exhibit was the republication of one of Thackeray's novels. I should have supposed, before reading the entire statute, that the republication of old novels or books would not have been within the contemplation of the law-givers as favored publications, since there seemed to be nothing in such admission of reprints to favor native living authors. But I find nothing in the law to indicate that such a purpose was in the mind- of the legislators; for in the enumeration of third-class matter, paying eight times as much as second class mail, are included "proof sheets, corrected proof sheets, and manuscript accompanying the same," which would seem more like a discrimination against our living authors than an encouragement; and by section 15 "foreign newspapers and other *periodicals* of the same general character as *those* admitted to the second class in the United States may, under the direction of the Postmaster General, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States."

But the insertion in newspapers and magazines of chapters of completed books, and the insertion in serial form of English and American writings is no novelty. Most of the famous novels of Dickens, Reade, etc., were published in our magazines and newspapers contemporaneously with their publication in England. The European newspapers and magazines admitted to second class rates, as we have seen, especially those published in France, generally contain parts of books. One at least of the best known magazines here (Lippincott's) publishes in each number a completed work; and no objection could be made to its second class privileges for that reason.

I have examined this case with care, and can see no reason why the preliminary injunction already granted should not be made perpetual, and I shall so order.

A. B. HAGNER,
Asso. Justice.

Stipulation.

Filed March 20, 1903.

In the Supreme Court of the District of Columbia.

Eq. No. 23342.

HOUGHTON ET AL.
vs.
PAYNE, Postmaster-General.

It is stipulated by and between counsel for the respective parties that the original exhibits filed on behalf of the complainants
23 and the defendant may be certified with the transcript of the record in lieu of copies thereof; and that such exhibits in the Court of Appeals may be used at the hearing of the cause and examined by the court and the printing thereof dispensed with.

HOLMES CONRAD,
Solicitor for the Complainant-.
MORGAN H. BEACH,
HENRY H. GLASSIE,
Solicitors for the Defendants.

Mandate.

Filed June 6, 1904.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:

Whereas, lately in the supreme court of the District of Columbia, before you, or some of you, in a cause between Henry O. Houghton, trustee; George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, complainants, and Henry C. Payne, Postmaster General, defendant, equity No. 23,342, wherein the decree of the said supreme court entered in said cause on the 10th day of March, A. D. 1903, is in the following words, viz:

This cause coming on to be heard upon the bill and the exhibits filed therewith and on the papers filed in the cause and the proceedings had therein, was argued by counsel. On consideration thereof it is this 10th day of March, 1903, adjudged, ordered and decreed,

1. That the complainants are entitled to have their publications entitled "Riverside Literature Series," received and transmitted through the mails, as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879.

2. That the Postmaster General be, and he is hereby perpetually restrained from enforcing and continuing the cancellation of the certificate of entry set fort in paragraph six, of said bill, and from refusing to receive said publication and transmit the same through the mails, as mailable matter of the second class, in accordance with the provisions of said act of Congress approved March 3, 1879, and from denying to the complainants the receipt, entry and transmission through the mails of their publication, entitled "Riverside Literature Series," as mailable matter of the second class as defined by the act of Congress approved March 3, 1879.

3. That the complainants do recover of the defendant
24 their costs incurred in this suit, and may have execution therefor according to law.

A. B. HAGNER,
Asso. Justice.

as by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the term of April, in the year of our Lord one thousand nine hundred and three, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court, in this cause be, and the same is hereby reversed with costs; and that the said defendant recover against the said complainants, Henry O. Houghton, trustee; George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, thirty-nine dollars and seventy cents, for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court with direction to dismiss the bill.

June 5, 1903.

And whereas said cause was removed to the Supreme Court of the United States by virtue of an appeal taken by the complainant, agreeably to the act of Congress in such case made and provided; and whereas at the October term A. D. 1903, of the said Supreme Court of the United States the following decree was entered, viz:

"It is now here ordered, adjudged, and decreed by this court that the decree of the said Court of Appeals in this cause be, and the same is hereby, affirmed with costs; and that the said appellant, Henry C. Payne, Postmaster General, recover against the said appellees for his costs herein expended and have execution therefor.

April 11, 1904."

as by the inspection of the mandate of the said Supreme Court of the United States fully and at large appears.

You, therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals, the 6th day of June, in the year of our Lord one thousand nine hundred and four.

25 *Costs of Defendants.*

Clerk	$12.20	Due
Printing record	27.50	
	39.70	

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Order Making George B. Cortelyou Defendant.

Filed March 27, 1905.

In the Supreme Court of the District of Columbia.

23342.

HENRY O. HOUGHTON ET AL.
vs.
HENRY C. PAYNE, Postmaster General.

Upon consideration of the suggestion of death of the defendant herein and the motion that George B. Cortelyou be substituted as defendant it is this 27th day of March, 1905, by the court ordered

That George B. Cortelyou, Postmaster General of the United States be and he is hereby substituted as defendant in this cause and that the same be maintained by and against him.

THOS. H. ANDERSON, *Justice.*

Motion for Decree.

Filed March 29, 1905.

In the Supreme Court of the District of Columbia.

Equity. No. 23342.

HENRY O. HOUGHTON ET AL.
vs.
HENRY C. PAYNE, Postmaster General.

Now comes the defendant and moves the court to enter a decree on the mandate of the Court of Appeals filed herein, and to dismiss

the bill, dissolve the injunction and ascertain the damages suffered by the defendant by reason of the suing out thereof.

HENRY H. GLASSIE,
Sol. for Def'd't.

26 To the Hon. Holmes Conrad, William S. Hall, and Leigh Robinson.

GENTLEMEN: Take notice that I have this day calendared the foregoing motion to be heard on Friday, March 31, 1905, at ten o'clock, a. m. by the equity court to which it may be assigned.

HENRY H. GLASSIE,
Sol. for Def'd't.

Decree.

Filed July 7, 1905.

In the Supreme Court of the District of Columbia.

Equity. No. 23342, Doc. 52.

HENRY O. HOUGHTON ET AL.
vs.
GEORGE B. CORTELYOU, Postmaster General.

This cause came on to be further considered upon the motion to enter a decree upon the mandate of the Court of Appeals, filed herein on June 6, 1904, (which is here produced to the court), and for a reference to ascertain the damages suffered by the defendant by reason of the wrongful suing out of the injunction herein, and was argued by counsel: whereupon it is this 7th day of July, 1905, by the court adjudged, ordered and decreed that the decree hereinbefore entered on March 10, 1903, be and the same, in obedience to said mandate, is hereby reversed and set aside; that the bill of the aforesaid complainants be and the same is hereby dismissed with costs adjudged in the Supreme Court of the United States, the Court of Appeals, and in this court, and that the injunction heretofore granted be and the same is hereby dissolved.

And the court, upon consideration of the bill and answer, and stipulation herein, is of the opinion that the complainants and the surety on the injunction undertaking given in this cause are not, as a matter of law, liable in damages thereon, and also that the defendant is not entitled to recover damages resulting from the injunction requiring him to receive the publications of the complainants and transmit same through the mails as mailable matter of the second-class, and it is further adjudged, ordered and decreed that the motion for the ascertainment of damages upon such undertaking be and the same is hereby overruled and denied, and the injunction undertaking aforesaid be and the same is hereby cancelled and annulled.

THOS. H. ANDERSON, *Justice.*

And the defendant, in open court, by direction of the Post Office Department, and acting under that direction, prays an appeal to the Court of Appeals from so much of the foregoing decree as denies the motion for the ascertainment of damages and cancels and annuls the injunction undertaking herein, which is hereby allowed.

THOS. H. ANDERSON.

27 *Order Extending Time for Filing Transcript.*

Filed July 7, 1905.

In the Supreme Court of the District of Columbia.

No. 23342, Doc. 52.

HOUGHTON ET AL., Complainant-,
vs.
GEO. B. CORTELYOU, Defendant.

On application of the defendant's counsel, the complainant- consenting thereto, it is, this 7th day of July, 1905, ordered, that the time for filing the transcript herein in the Court of Appeals, be and the same is hereby extended to the first Tuesday in October, 1905.

THOS. H. ANDERSON, *Justice.*

HOLMES CONRAD,
Att'y for Compl'ts.

Direction.

Filed August 21, 1905.

In the Supreme Court of the District of Columbia.

Equity. No. 23342.

HENRY O. HOUGHTON, Trustee, ET AL.
vs.
GEORGE B. CORTELYOU, Postmaster General.

The clerk of the court, in making up the record on appeal in this cause will include: (1) bill of complaint and restraining order; (2) answer of the defendant; (3) replication; (4) decree of March 10, 1903; (5) mandate of the Court of Appeals; (6) order substituting George B. Cortelyou as defendant; (7) motion for decree on mandate and ascertainment of damages; (8) injunction undertaking; (9) final decree on mandate; (11) such other papers as are required by the rules of the Court of Appeals.

HENRY H. GLASSIE,
Counsel for Defendant.

I consent.
WM. S. HALL,
Counsel for the Complainants.

28 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 45, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 23,342, in equity, wherein Henry O. Houghton, trustee, *et al.* are complainants, and George B. Cortelyou, Postmaster General, is defendant, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 14″ day of September, A. D. 1905.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1607. George B. Cortelyou, Postmaster General, appellant, *vs.* Henry O. Houghton, trustee, *et al.* Court of Appeals, District of Columbia. Filed Sep. 15, 1905. Henry W. Hodges, clerk.

29 *Addition to Record per Stipulation of Counsel.*

Court of Appeals of the District of Columbia.

October Term, 1905.

No. 1607.

GEORGE B. CORTELYOU, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. MURRAY KAY, LUCY H. VALENTINE, HENRY O. HOUGHTON, OSCAR R. HOUGHTON, and ALBERT F. HOUGHTON.

Filed October 24, 1905.

Court of Appeals, District of Columbia.

No. 1607.

GEORGE B. CORTELYOU, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON ET AL.

In order to complete the record by the addition of papers inadvertently omitted by the clerk of the supreme court of the District of Columbia, it is hereby stipulated by and between counsel for the

respective parties, that there shall be added to the transcript of record in this court and printed as a part of the record, the injunction undertaking given by the complainants herein, and the stipulation as to damages filed in the court below.

HOLMES CONRAD,
Of Counsel for App'lee.
HENRY H. GLASSIE,
Counsel for Appellant.

[Endorsed:] No. 1607. Court of Appeals. Cortelyou, Postmaster General, *vs.* Houghton *et al.* Stipulation as to addition to record.

30 *Injunction Undertaking.*

Filed June 4, 1902. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 23342, Equity Docket —.

HENRY O. HOUGHTON ET AL., Complainant-,
vs.
HENRY C. PAYNE, Postmaster General, Defendant.

George H. Mifflin one of the complainants and the American Surety Company of New York, surety, hereby undertake to make good to the defendant all damages by him suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above-entitled cause, and stipulate that the damages may be ascertained in such manner as the justice shall direct, and that on dissolving the injunction, he may give judgment thereon against the principal and surety for said damages in the decree itself dissolving the injunction.

GEORGE H. MIFFLIN,
[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By JNO. S. LOUD, *Resident Vice-President.*

Attest:
LEONARD DAMMANN,
Resident Assistant Secretary.

"Washington agency No. 333."

Approved: 4th June, 1902.
A. B. HAGNER, *Justice.*

Stipulation as to Damages for Postage.

Filed July 7, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Equity. No. 23342.

HENRY O. HOUGHTON ET AL.
vs.
GEORGE B. CORTELYOU, Postmaster General.

It is hereby stipulated and agreed by and between the counsel for the complainants herein and the American Surety Company of New York, on the one part, and the counsel for the defendant herein on the other part, that the following is a true and accurate statement of the number of pounds of the Riverside Literature Series
31 mailed at Boston, Massachusetts, the postage due thereon at the third class rate, the postage paid thereon at the pound or second class rate, and the difference between the postage at the pound and third class rates, to wit, $6880.86, between the date of the filing of the injunction herein and June 16, 1904, when such mailings at the second class rate were discontinued, and during the period in which the Postmaster General was restrained from refusing to transport said publication at the second class rate and from charging the third class rate thereon, to wit:

C. D. No. 8115.

Mailings of "Riverside Literature Series," Boston, Mass.

Quarter ended—	Number of pounds mailed.	Postage at third class rate.	Postage at pound rate.	Difference between postage at pound and third class rates.
June 30/02 (partial quarter)	1451	$116.08	$14.51	$101.57
Sep. 30/02	12803	1,024.24	128.03	896.21
Dec. 31/02	12284	982.72	122.84	859.88
Mar. 31/03	14060	1,124.80	140.60	984.20
June 30/03	8845	707.60	88.45	619.15
Sep. 30/03	12307	984.56	123.07	861.49
Dec. 31/03	14892	1,191.36	148.92	1,042.44
Mar. 31/04	13407	1,072.56	134.07	938.49
June 16/04 (partial quarter)	8249	659.92	82.49	577.43
	98298	$7,863.84	$982.98	$6,880.86

And it is further stipulated and agreed that such account may be taken as equivalent to all intents and purposes to a finding of fact of the auditor to the same effect upon a reference to ascertain what

damages, if any, were suffered by the defendant by reason of wrongfully and inequitably suing out the injunction herein, the question whether such damages should be recovered [as a matter of law]* being reserved for the determination of the court.

Five printed words stricken out.

HENRY H. GLASSIE,
Solicitor for the Defendant.
HOLMES CONRAD,
Of Counsel for Compl'ts.

32 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing are true copies of the injunction undertaking and stipulation as to damages for postage, filed and of record in cause entitled Henry O. Houghton, *et al.*, complainants, *vs.* George B. Cortelyou, Postmaster General of the United States, defendant, equity No. 23,342; the same being inadvertently omitted from the transcript of record heretofore transmitted to the Court of Appeals of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 24″ day of October, A. D. 1905.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

[Endorsed:] No. 1607. George B. Cortelyou, Postmaster General, appellant, *vs.* Henry O. Houghton, *et al.* Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Oct. 24, 1905. Henry W. Hodges, clerk.

33 TUESDAY, *February 13th, A. D.* 1906.

No. 1607.

GEORGE B. CORTELYOU, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. MURRAY KAY, LUCY H. VALENTINE, HENRY O. HOUGHTON, OSCAR R. HOUGHTON, and ALBERT F. HOUGHTON.

The argument in the above entitled cause was commenced by Mr. H. H. Glassie, attorney for the appellant.

[*Words enclosed in brackets erased in copy.]

WEDNESDAY, *February 14th, A. D.* 1906.

No. 1607.

GEORGE B. CORTELYOU, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. MURRAY KAY, LUCY H. VALENTINE, HENRY O. HOUGHTON, OSCAR R. HOUGHTON, and ALBERT F. HOUGHTON.

The argument in the above entitled cause was continued by Messrs. Wm. S. Hall and Holmes Conrad, attorneys for the appellees, and was concluded by Mr. H. H. Glassie, attorney for the appellant.

34 No. 1607.

GEORGE B. CORTELYOU, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. MURRAY KAY, LUCY H. VALENTINE, HENRY O. HOUGHTON, OSCAR R. HOUGHTON, and ALBERT F. HOUGHTON, Appellees.

Opinion.

(Mr. Justice DUELL Delivered the Opinion of the Court.)

This appeal is taken to review so much of a decree entered herein as denies appellant's motion for a reference to ascertain the damages suffered by appellant through the suing out of the injunction granted herein.

A brief history of the case is required for the proper understanding of the question presented by the appeal.

The appellees on May 31, 1902 filed their Bill of Complaint against Henry C. Payne, deceased, then Postmaster General, asking that Mr. Payne, referred to in the complaint as holding the office of Postmaster General, be enjoined from cancelling the certificate of entry permitting certain publications of complainants to be transmitted at second class rates, and requiring him to receive said publications and transmit them through the mail as mailable matter of the second class. Upon the same day the Court below ordered that, upon complainants filing the undertaking required by Equity Rule 42, the defendant be restrained as prayed, "until further order, to be made, if at all, after a hearing which is fixed for the 16th day of June at 10 o'clock a. m. 1902."

The injunction undertaking was filed the same day and is as follows:

"George H. Mifflin one of the complainants and the American Surety Company of New York, surety, hereby undertake to make good to the defendant all damages by him suffered or sustained by

reason of wrongfully and inequitably suing out the injunc-
35 tion in the above-entitled cause, and stipulate that the dam-
ages may be ascertained in such manner as the justice shall direct, and that on dissolving the injunction, he may give judgment thereon against the principal and surety for said damages in the decree itself dissolving the injunction."

No hearing was had on June 16, 1902 and no further order was made until on March 10, 1903, when the case was heard on bill and answer, and the injunction was made perpetual. From such decree an appeal was taken to this Court which on June 5, 1903 reversed the decree (22 App. D. C. 234). An appeal was thereupon taken to the Supreme Court of the United States, the injunction being continued pending the appeal. On April 11, 1904, the decree of this Court was affirmed by the Supreme Court (194 U. S. 88).

George B. Cortelyou, who was on March 27, 1905 and still is, Postmaster General was on that day duly substituted as defendant. Two days thereafter the motion for the decree above referred to was filed.

A decree was granted July 7, 1905 and is as follows:

"This cause came on to be further considered upon the motion to enter a decree upon the mandate of the Court of Appeals, filed herein on June 6, 1904, (which is here produced to the court), and for a reference to ascertain the damages suffered by the defendant by reason of the wrongful suing out of the injunction herein, and was argued by counsel: whereupon it is this 7th day of July, 1905, by the court adjudged, ordered and decreed that the decree hereinbefore entered on March 10, 1903, be and the same, in obedience to said mandate, is hereby reversed and set aside; that the bill of the aforesaid complainants be and the same is hereby dismissed with costs adjudged in the Supreme Court of the United States, the Court of Appeals, and in this Court, and that the injunction heretofore granted be and the same is hereby dissolved.

"And the court, upon consideration of the bill and answer, and stipulation herein, is of the opinion that the complainants
36 and the surety on the injunction undertaking given in this cause are not, as a matter of law, liable in damages thereon, and also that the defendant is not entitled to recover damages resulting from the injunction requiring him to receive the publications of the complainants and transmit same through the mails as mailable matter of the second class, and it is further adjudged, ordered and decreed that the motion for the ascertainment of damages upon such undertaking be and the same is hereby overruled and denied, and the injunction undertaking aforesaid be and the same is hereby cancelled and annulled."

It is from such portion of this decree as denies appellant's right to an ascertainment of damages &c. that an appeal was taken as above stated.

Appellant by his assignments of error urges that the Court below erred:

"(1) In holding that the complainants and their sureties on the injunction undertakings are not, as matter of law, liable in damages thereon.

"(2) In holding that the Postmaster General is not entitled to recover damages resulting to him as Postmaster-General from the injunction requiring the transmission of the publications of the complainants as second-class mail matter instead of third-class mail matter.

"(3) In holding that the defendant, as Postmaster-General, is not entitled to receive, under such injunction undertakings, the amount of postage which, as Postmaster-General, he was restrained from collecting.

"(4) In holding that the injunction undertakings were not liable for damages suffered between the original decree in the court below and the decree upon the mandate of this court setting aside such original decree.

"(5) In directing that such undertaking should be can-
37 celed and annulled."

The position of the appellees, on the other hand, as we understand it, is First: That as it was within the power of the trial court to decide whether damages should be given the appellant, its action can only be reviewed if its judicial discretion has been improvidently exercised; Second. That no damages can be recovered because no bond was asked or given on account of the injunction which was finally vacated; and Third, that the damages sought to be collected are damages to the United States, which are not recoverable because it was not, and could not be a party to the action.

Before proceeding to the consideration of the alleged errors it should be said that a stipulation as to damages has been signed by counsel for the respective parties. It shows that the difference between the postage at the pound and third class rates, between the filing of the injunction herein and June 16, 1904, when the injunction commenced to operate, amounted to the sum of $6880.86. The stipulation further provides, "that such account may be taken as equivalent to all intents and purposes to a finding of fact of the auditor to the same effect upon a reference to ascertain what damages, if any, were suffered by the defendant by reason of wrongfully and inequitably suing out the injunction herein, the question whether such damages should be recovered being reserved for the determination of the court."

This stipulation obviates the necessity for a reference to ascertain the amount of damages.

Turning now to consider the contentions of the parties it may be said that if the appellees are right in any one of the three points raised by them it must follow that the appellant's assignments of error are not well taken. Such being the case it will be best to examine the case from appellees' view point.

1. Should the decision of the trial court refusing to order
38 an accounting, or to give damages to the appellant, be reviewed by this Court?

Ordinarily where an injunction is vacated a reference is ordered to ascertain the damages. No damages may have been suffered and therefore none may be recoverable, and yet so strong is the

presumption that damages have been inflicted that a court rarely declines to order a reference. The argument upon which an appellate court has sometimes refused to disturb the ruling of the trial court that damages ought not to be recovered, and the bond prosecuted, is that the trial court has had the advantage of watching the conduct of the parties and the conduct of the litigation and therefore is best able to determine the question. Russell *v.* Farley, 105 U. S. 433. But this reason is of little force where, as in the present case, the facts are set out in the pleadings, upon which the hearing is had, and in due course the questions at issue come before the appellate court on appeal upon the merits. We see nothing in the present case to preclude us from reviewing the decision of the trial court. An undertaking given as a condition to the grant of an injunction means, and ought to mean, something. In the case at bar the question was as to what rate the appellees should have certain of their publications carried in the mails. True they had had them carried for some years at a low rate. The Postmaster General did not seek to compel them to pay the higher rate for the past but only for the future. They disputed the correctness of his ruling, and in order to prevent him from enforcing it, they secured an injunction. They could have suspended the publication during the pendency of the litigation, or could have paid the additional postage under protest, and had they prevailed Congress undoubtedly would have given them relief. They preferred to give an undertaking, and the measure of damages if they lost their case was not problematical, but clearly was the difference between the two rates of postage. They forced the defendant, acting in his representative capacity and for the Government, to defend the action. They took
39 the risks of litigation, and must have known what they were doing when they gave the injunction bond. If it were in reality, as in name, a contest between two individuals the appellees' contention would be at once brushed aside. We see no valid reason why a different rule should be applied because one of the parties is the representative of the United States. The people may be better able to stand the loss arising out of the grant of the injunction than would be an individual, but that is no reason for applying a different rule. As well might it be urged that the relative wealth of two litigants should control as to whether one who had been damnified should be indemnified. Because appellees had had their publications carried for years at a lower rate than they were entitled to is no valid reason why they should have that right pending litigation. When they gave a bond they must have known that they were assuming a liability. As well might an endorser of a promissory note plead that he never expected to be obliged to make his endorsement good. We think there is little merit in this first objection to the enforcemnt of the undertaking.

2. The second ground urged by appellees is that no bond was asked or given on account of the injunction which was finally vacated. In other words that the injunction to obtain which they gave the bond in question ceased to be operative when the trial court signed the decree of March 10, 1903, which granted a perpetual

injunction. Conceding the correctness of this contention the appellees would still be liable for damages from May 31, 1902 to March 10, 1903, provided the general objection that the appellant is in no event entitled to recover damages be held not well grounded.

But we do not think the bond ceased to be in force after the decree was entered making the injunction perpetual. The parties by their actions, treated it as though it continued to apply. The appellant would, had any question been raised, have asked for a new bond, in which event the appellees doubtless would have conceded that the bond remained in force. When the main case was before this court and later was taken to the United States Supreme Court
40 it was considered that the original undertaking was in force or a new one would have been required, one other than the supersedeas bond then given.

Doubtless there may be found a class of cases where a final decree being entered, with a provision for a perpetual injunction, the bond given on the grant of a temporary injunction may not be held to be longer in force. This is not such a case, and the rules of the District Supreme Court are such that we think an injunction bond once given may continue until the termination of the litigation. Such was held to be the case in Dodge *v.* Cohen 14 App. D. C. 582, 597. The facts in that case, while not identical with the facts of the case at bar, are so similar that we distinguish no material difference, so far as those facts relate to the injunction and bond. In that case a bond was given when an order was passed restraining the defendant from prosecuting certain suits at law, appointing receivers to take possession of the property in dispute, authorizing them to sell the same, and referring the cause to the Auditor to state an account and distribute the proceeds of the sale. Some four years later a decree was entered from which an appeal was taken. The decree was reversed, and on the going down of the mandate, a reference was ordered to ascertain and report the damages. It was contended on the part of the parties who had given the bond that damages could not be assessed for any time after the date of the final hearing from which the appeal was taken. Upon appeal to this Court their contention was overruled. It was said, "The injunction remained in force, and as long as the injunction remained in operation the undertaking remained in force as a means of indemnity." We think that ruling is of equal force in the present case. The undertakings in both cases are almost word for word the same. Both injunctions were given before any decree was entered that was appealed from. The suit and the appeal are one proceeding and until a final determi-
41 nation of the suit no action can be successfully brought on an injunction bond, though the injunction may have been dissolved. Gray *v.* Veirs, 33 Md. 159, 160. We agree with the statement of appellant's counsel that, "The life of the injunction is from the date of its original issuance to the date of the dismissal of the bill, by which its unlawfulness was determined." The undertaking covers the same period. As was well said by the former Chief Justice of this Court in Hamilton *v.* State *use* of Hardesty, 32 Md. 354,

where it was urged that a supersedeas appeal bond took the place of a prior injunction bond,

"Taking the appeal and giving the appeal bond as required by law had the effect of staying and suspending the operation of the order of dissolution, and of leaving the order granting the injunction in full force as if no order dissolving the injunction had passed. The defendant in those proceedings was not at liberty to proceed with the foreclosure of his mortgage or the collection of his rents during the pendency of the appeal, nor could he have sued the injunction bond after the order of dissolution and before its affirmance by the Court of Appeals; for, after filing the appeal bond, and by that means staying and suspending the effect of the order of dissolution, the injunction was as operative as ever. * * * And, though the appeal bond was conditioned to prosecute the appeal with effect, and by breach of which the appellee became entitled to recover damages sustained by reason of the appeal, it is but *cumulative security* to the injunction bond *except* as to the *costs* on the appeal to which the appeal bond alone is chargeable."

3. It is further urged by appellees that the damages sought to be collected do not belong to the defendant but to the United States, and that as it was not and could not be a party to the suit, no damages can be collected. We think the answer to this contention is a simple one. The appellant is Postmaster General of the United States. His predecessor against whom the suit was originally brought
42 was the then Postmaster General, and the bill of complaint so alleges, so designates him in the caption, and the answer admits it. Had he been sued as Henry C. Payne, with no averment as to his office or as to his interest, duties or powers in the premises, the bill would have been dismissed. He was made defendant because he was Postmaster General, and because in pursuance of authority claimed by him, as Postmaster General, he had given notice that he in his official capacity, would do certain things, which these appellees considered to be unlawful and against their personal interests. Henry C. Payne, the individual, had no more interest in the matter than any other citizen of the United States. The suit was against him in his official capacity, otherwise his successor in office, the present appellant, would be without standing and an intruder. Payne's executors or administrators could not have been substituted as defendants upon his death, for they were not authorized to collect and disburse the postal revenues. That duty devolved upon his successor in office. We think it is begging the question to say that the United States was not a party to the suit and could not be. That in one sense is true, but the courts have recognized that there is a class of cases where it is absolutely essential in the interests of justice that actions should in some form lie, in reality though not in name, against the United States and therefore they have permitted such actions to be brought against the Executive officers of the United States to prevent them from doing, or to compel them to do something in their representative capacities, which in reality affect the Government's interest and in which the Government's officer has no personal interest. This is one of those cases. It is the duty of the

Postmaster General to collect the postal revenues. When collected they are used to defray the expenses of the service. Appellant's counsel has referred to the statutes governing the duties of the Postmaster General and has summed up such duties most clearly.
43 He says:

"These postal revenues remain a distinct fund and are denominated "deposits." The postal service is maintained out of its own revenues. All expenditures not settled directly by postmasters are made by warrants of the Postmaster-General drawn upon this fund of the postal revenues, and only when postal revenues are insufficient to meet the current expenses does the Postmaster General make a requisition upon the Treasury pursuant to the appropriations provided to meet such deficiencies. The amount is then placed to the credit of the Post-Office Department and transferred by the Postmaster-General to such assistant treasuries as may be necessary. Thus it will be seen that the postal revenues, even after collection, constitute a separate, distinct, and identifiable fund of which the Postmaster-General is the supreme administrator, and which is not only collected but disbursed by him."

The conclusion he draws therefrom is logical and convincing and we quote it:

"It was as administrator or trustee of these revenues that the Postmaster-General was enjoined at the instance of the complainants, upon the theory that he was about to make an unlawful charge which would inure to the benefit of those revenues. Just as the complainants upon that statement of the case were entitled to a remedy against the agent doing the supposed wrongful act, so are they bound to indemnify that agent for the effect of that remedy when the act turns out not to be wrongful at all. It would be contrary to the most elementary principles of justice that the complainants, asserting a right against the defendant in one capacity, could escape the consequences of the assertion of that right upon the plea that because it turns out that their claim of right was unfounded they may insist that they sued the defendant in another capacity. The relief
44 and the indemnity were reciprocal and commensurate. The Postmaster-General was sued in his official capacity; he thereby suffered damage in his official capacity; must he not be made good in his official capacity?"

It was, as we have seen his duty to collect from the appellees the postage due from them. To wilfully fail to do so would have been negligence upon his part. When he was enjoined from making the collections it was his bounden duty to protect himself, and the United States whom he represented, just as it is the duty of any trustee, or other person acting in a representative capacity. He is under obligations to collect and credit the United States the postage withheld from him by these appellees. He has no power to excuse them from such payment. Nay more, there is a duty imposed upon him to use all lawful means to enforce their collection. When this postage was kept from him he was damnified, and being damnified he was entitled to indemnity. The undertaking was given for his protection, and to enable him, if his position was legal, to collect

for the Government, which he represented, the postage which through his representative, the Postmaster, he was under a legal obligation to account for.

In his representative capacity, and as against these appellees, he is entitled to the withheld postage, as damages. True he must account to the United States for them when collected, but until he receives them he cannot turn over the amount of damages received. It seems to us his position is analogous to that of the defendants in Andrews *v.* Glenville Woolen Co., 50 N. Y. 282. It seems that judgments were recovered in the name of the Glenville Company by persons claiming the right to use its name for that purpose. The defendant company was restrained from enforcing the judgments, the plaintiff giving an undertaking. The bill being dismissed a reference was had to ascertain the damages, and it was contended, as here, that as the defendant company had no interest in the result, it had sustained no injury. The Court said, "If this objection
45 was valid it shows that the undertaking had no force or effect whatever; and that a party who is prosecuting a claim according to law in the name of another person may be enjoined in fact, though not by name, without having the indemnity which the Code purports to provide, in case it should result that there were no grounds for the injunction. Such a conclusion should not be drawn unless clearly required by law; for it would be not only exceedingly unjust to the party whose proceedings are enjoined, but would also liberate the applicant for the injunction from the wholesome condition which the law imposes upon him of giving security for the damages he may occasion, should his claim prove to be without foundation. It seems to me to be more reasonable to hold that when proceedings, conducted by one party for his own benefit in the name of another, are restrained by an injunction not directed to the party in interest by his name, the damages and expenses incurred by him in procuring the discharge of the injunction should be presumed in law to have been incurred by the defendant on the record, and should be recoverable in his name for the benefit of the real party in interest."

To the same effect is the case of Oelrichs *v.* Spain, 15 Wall. 211. Spain enjoined, in a certain proceeding, one Wetmore from dealing with a certain fund which he held as custodian or trustee for certain persons, one of whom, Hill, was not a party to the bill. Spain's bill was finally dismissed. Hill's child, who was his heir and legatee filed a bill thereafter to assert his father's claim for damages occasioned by the granting of the injunction, and the securities on the bond given in the Spanish case were made defendants. A similar contention was made as in the case at bar. The Court at page 229 said:

"It is true that neither Hill nor his representatives were parties to the bond of May or the bond of Oelrichs, and that they were not named in the writ of injunction upon the filing of the first bond. But Spain's bill averred that Wetmore held the fund in trust
46 for Hill. Wetmore was an obligee in both bonds. The legal title to the entire fund was in him and was never divested.

* * * Wetmore, during his lifetime, and after his death his legal representatives, might have recovered upon the bonds at law *to the full extent of the damage touching the entire fund.* Such was his and their legal right.

We can see no reason why the principle laid down in these cases does not apply, even though the United States, and not an individual, is the party who is ultimately benefited by receiving the damages admitted to have been suffered through the issue of the injunction. Concluding therefore that the appellees' position is untenable it follows that the appellant's assignments of error are well founded. Without further extending the scope of this opinion to include questions raised, but which, in our opinion are not relevant or necessary to the determination of the case, we conclude that the Court below was in error in holding that as a matter of law the appellant was not entitled to damages, and in releasing the appellees and their surety, from the obligations of the injunction undertaking and in refusing to order a reference to ascertain the damages. As the amount of the damages has since been stipulated it will be unnecessary to order a reference.

So much of the decree as was appealed from is reversed, with costs, and the Court below is directed to enter a decree against complainants, and the surety upon the injunction bond, for the sum of $6,880.86, with interest from July 7, 1905.

Reversed.

47 WEDNESDAY, *March 7th,* A. D. 1906.

No. 1607, January Term, 1906.

GEORGE B. CORTELYOU, Postmaster General, Appellant,

vs.

HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. MURRAY KAY, LUCY H. VALENTINE, HENRY O. HOUGHTON, OSCAR R. HOUGHTON, and ALBERT F. HOUGHTON.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that so much of the decree of the said Supreme Court in this cause appealed from, be, and the same is hereby, reversed with costs; and that this cause be and the same is hereby remanded to the said Supreme Court with directions to enter a decree against the complainants, and the surety upon the injunction bond, for the sum of $6,880.86, with interest from July 7, 1905.

Per MR. JUSTICE DUELL.

MARCH 7, 1906.

THURSDAY, *March 22d, A. D.* 1906.

No. 1607.

GEORGE B. CORTELYOU, Postmaster General, Appellant,
vs.
HENRY O. HOUGHTON, Trustee; GEORGE H. MIFFLIN, J. MURRAY KAY, LUCY H. VALENTINE, HENRY O. HOUGHTON, OSCAR R. HOUGHTON, and ALBERT F. HOUGHTON.

On motion of Mr. Holmes Conrad, of counsel for the appellees, in the above entitled cause, It is ordered by the Court that
48 said appellees be allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars, and the bond to act as supersedeas is fixed at the sum of ten thousand dollars.

49 Know all men by these presents, That we, Henry O. Houghton, Trustee; George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton, as principals, and American Surety Company of New York, a corporation existing under the laws of the State of New York, having an office and usual place of business at Boston, Mass., as surety, are held and firmly bound unto George B. Cortelyou, Postmaster General, in the full and just sum of Ten Thousand ($10,000) dollars, to be paid to the said George B. Cortelyou, Postmaster General, his certain attorney, successors, executors, administrators, or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2d day of May, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between George B. Cortelyou, Postmaster General, Appellant, and Henry O. Houghton, Trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, appellees, a decree was rendered against the said Henry O. Houghton, Trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton and the said Henry O. Houghton, Trustee; George M. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton, having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said George B. Cortelyou, Postmaster General, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Henry O. Houghton, Trustee, George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and

Albert F. Houghton shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of American Surety Co. of New York.]

HENRY O. HOUGHTON, *Trustee;* [SEAL.]
GEORGE H. MIFFLIN, [SEAL.]
HENRY O. HOUGHTON, [SEAL.]
JAS. MURRAY KAY, [SEAL.]
L. H. VALENTINE, [SEAL.]
O. R. HOUGHTON, [SEAL.]
A. F. HOUGHTON, [SEAL.]
By G. H. MIFFLIN. [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK,
By ELIPHALET F. PHILBRICK, [SEAL.]
Resident Vice-President.

Attest:
WALTER S. BUCKLIN,
Resident Ass't Secretary.

Sealed and delivered in presence of—
WILLIAM F. STEARNS,
For Henry O. Houghton, Trustee;
Henry O. Houghton and James Murray Kay.
FRANCIS J. GARRISON,
For George H. Mifflin, &
L. H. V., O. R. H., A. F. H., by G. H. Mifflin.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals, D. C.

[Endorsed:] No. 1607. George B. Cortelyou, Postmaster General, Appellant, *vs.* Henry O. Houghton, Trustee, *et al.* Supersedeas bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 5, 1906. Henry W. Hodges, Clerk.

50 UNITED STATES OF AMERICA, *ss:*

To George B. Cortelyou, Postmaster General, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Henry O. Houghton, Trustee; George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton and Albert F. Houghton are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 7th day of May, in the year of our Lord one thousand nine hundred and six.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 9th day of May, A. D. 1906.
HENRY H. GLASSIE.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 9, 1906. Henry W. Hodges, Clerk.

51 Court of Appeals of the District of Columbia.

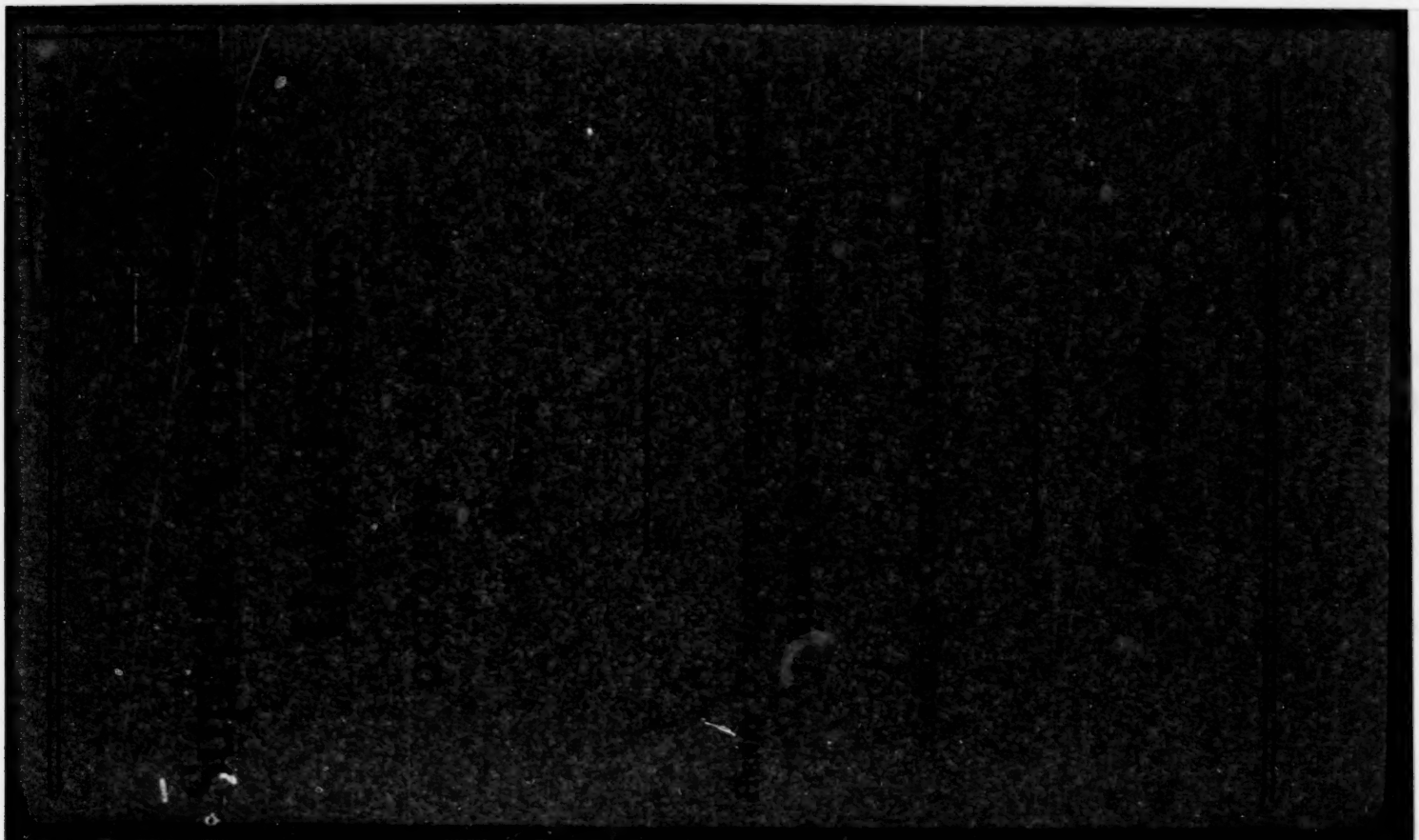
I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 50 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of George B. Cortelyou, Postmaster General, Appellant, *vs.* Henry O. Houghton, Trustee; George H. Mifflin, J. Murray Kay, Lucy H. Valentine, Henry O. Houghton, Oscar R. Houghton, and Albert F. Houghton, No. 1607, April Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 6th day of June A. D. 1906.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,281. District of Columbia Court of Appeals. Term No. 316. Henry O. Houghton, trustee; George H. Mifflin, J. Murray Kay *et al.*, appellants, *vs.* George B. Cortelyou, Postmaster General. Filed June 8th, 1906. File No. 20,281.



Supreme Court of the United States

OCTOBER TERM, 1907

No. 49

HOUGHTON, TRUSTEE, ET AL., *Appellants*,

vs.

GEORGE B. CORTELYOU, *Postmaster-General*

BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

The question involved is whether damages should be awarded the appellee on account of an injunction issued by the Supreme Court of the District of Columbia upon a bill brought by the appellants.

For sixteen years previous to the filing of the bill the Post Office Department, under rulings of successive Postmasters-General, had received the appellants' publications as second-class matter at the rate of one cent per pound. Just previous to the filing of the bill the then Postmaster-General declared the appellants' publications to be third-class matter and subject to a rate of eight cents per pound.

It was to test the validity of this change of construc-

tion made by the Department that the bill was brought —a question upon which this court was divided.

Houghton *v.* Payne, 194 U. S. 88, 100.

May 31, 1902, the bill was filed, and thereupon the court issued a preliminary injunction to continue until hearing, and the complainants gave bond to make good all damages suffered by reason of wrongfully or inequitably suing out this preliminary injunction.

February 27, 1903, there was a hearing on the merits, and on March 10, 1903, a permanent injunction was granted and decree entered.

Upon the issuing of this permanent injunction under this decree no bond was asked for and no bond was ordered or given.

The defendant appealed from this decree to the Court of Appeals, District of Columbia, and on June 5, 1903, that court reversed the judgment of the lower court and ordered the bill dismissed.

The appellants appealed to this court, which affirmed the decree of the Court of Appeals, and afterwards, on July 7, 1905, the following decree was entered in the Supreme Court of the District of Columbia:—

HENRY O. HOUGHTON *et al.*

vs.

GEORGE B. CORTELYOU, *Postmaster-General.*

This cause came on to be further considered upon the motion to enter a decree upon the mandate of the

Court of Appeals filed herein on June 6, 1904 (which is here produced in court), and for a reference to ascertain the damages suffered by the defendant by reason of the wrongful suing out of the injunction herein, and was argued by counsel: whereupon it is this 7th day of July, 1905, by the court adjudged, ordered, and decreed that the decree hereinbefore entered on March 10, 1903, be and the same in obedience to said mandate is hereby reversed and set aside; that the bill of the aforesaid complainants be and the same is hereby dismissed with costs adjudged in the Supreme Court of the United States, the Court of Appeals, and in this court, and that the injunction heretofore granted be and the same is hereby dissolved.

And the court, upon consideration of the bill and answer and stipulation herein, is of opinion that the complainants and the surety on the injunction undertaking given in this cause are not, as a matter of law, liable in damages thereon, and also that the defendant is not entitled to recover damages resulting from this injunction requiring him to receive the publication of the complainants and transmit same through the mails as mailable matter of the second class, and it is further adjudged, ordered, and decreed that this motion for the ascertainment of damages upon such undertaking be and the same is hereby overruled and denied, and the injunction undertaking be and the same is hereby cancelled and annulled.

THOS. H. ANDERSON, *Justice.*

The defendant appealed to the Court of Appeals from so much of the foregoing decree as denies the motion for the ascertainment of damages and cancels and annuls the injunction undertaking.

By decree dated March 7, 1906, the Court of Appeals reversed so much of the decree as was appealed from, and the plaintiffs appealed to this court.

Specification of Errors

1. That the defendant ought not to recover damages resulting from the injunction issued in this cause. That it was within the power of the trial court to decide this question and its decision ought not to be reversed.

2. That no damages should be assessed on account of the injunction issued on March 10, 1903, because no bond or undertaking was ever asked for or given on account of this injunction.

Brief of the Argument

I

In the United States courts, where an injunction is granted, neither law nor equity gives any remedy in damages to the defendant, because it is regarded that the injunction flows from the judgment of the court, and not from the plaintiff; and where an injunction is granted and afterwards dissolved, there is no power to award damages unless bond or undertaking has been required upon the issue of the injunction.

Russell *v.* Farley, 105 U. S. 433.

Without a bond no damages can be recovered at all. Without a bond for the payment of damages or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, he can recover anything.

Meyers *v.* Block, 120 U. S. 206, 211.

There can be no claim of malicious prosecution.

Mr. Justice Hagner, upon final hearing, decided that the claim of the plaintiff was well founded and ordered an injunction to issue. His decree, though revised, is a complete answer to any claim of malicious prosecution.

Crescent Live Stock Co. *v.* Butchers' Union, 120 U. S. 141, 158.

When, however, a bond has been given, it is within the power of the trial court to decide whether any damages at all ought to be recovered.

In Russell *v.* Farley, 105 U. S. 433, 446, an injunction had been issued and an injunction bond given. On final hearing the injunction was dissolved, and the court held that no damages should be allowed.

On appeal, the Supreme Court of the United States held:

"The question before the court, or at least that which "it undertook to determine, was whether under the "circumstances of the case any damages at all ought to "be recovered. Its decision was that none ought to be

"recovered; or, in effect, that the bond ought not to "be prosecuted.

"In view of what has already been said, we think that "the court had power to decide this question.

"But the appellants contend that, even if the court "had power to pass upon the question at all, its de- "cision was erroneous and ought to be reversed on the "merits. On this point the judgment of the court ap- "proaches so near to the exercise of discretion that we "should require a very clear case to be made to induce "us to reverse it."

As before stated, for sixteen years prior to the filing of the bill, the Post Office Department, under rulings of successive Postmasters-General, had received the plaintiffs' publications as second-class matter at the rate of one cent per pound.

Six times during this sixteen years, upon changes in the period of publication from monthly to quarterly, the nature and character of these publications were examined by the Post Office Department, and each time it was solemnly determined by the Post Office Department "to be a publication entitled to admission to the "mails at the pound rate of postage."

The plaintiffs, relying upon this long-continued construction of the Post Office Department, had acted upon it in the conduct of their business.

Relying upon it, they had made contracts to supply two millions of these publications at a price based upon it. Then the Post Office Department changed its con-

struction and imposed upon the plaintiffs' publications an increased rate of postage, subjecting the plaintiffs to loss under contracts which they had been induced to make, relying on this long-settled construction of the Department.

At the time of the filing of the bill the plaintiffs were under contract obligation to supply these publications, the increased rate of postage upon which will have to be borne by the plaintiffs and which amounts to more than $20,000, even if relieved from payment of the amounts now claimed by the defendant.

This excess of postage which the Department seeks now to recover is postage on mail matter which the plaintiffs were bound to deliver under contracts which they had entered into, in the conduct of their business, relying upon the Department's repeated rulings on this very matter.

For the great loss which this change of ruling imposed upon them, after the dissolution of the injunction, and continued to impose upon them until the expiration of the last contract to deliver at a price based on the old rate, the plaintiffs have no legal remedy; but when the Department seeks in this proceeding to impose upon them this loss in difference of rates while the action was pending to ascertain whether the act of the Department was legal, the court can afford relief by refusing to impose such loss by way of damages. This loss the trial court refused to impose upon the appellants.

It is submitted that in equity and fair dealing the appellants should not be subjected to this loss.

The injustice which a citizen is subjected to by arbitrary changes in the settled practice of a government department received judicial recognition in

U. S. *v.* W. N. Proctor & Co. 145 Fed. Rep. 126.

II

It is further submitted that as matter of law no damages should be assessed on account of the injunction issued by the court on March 10, 1903, because,—

No bond was ever asked for or given on account of this injunction.

Upon the filing of the bill, May 31, 1902, the court issued the following preliminary injunction or restraining order:

"Upon the complainant filing undertaking, as re-
"quired by equity rule 42, the defendant will be hereby
"restrained as prayed in the within-mentioned bill, un-
"til further order, to be made, if at all, after a hearing,
"which is fixed for the 16th day of June at ten o'clock
"A. M., 1902, of which take notice.

"By the court:

"A. B. HAGNER, *Justice.*"

The defendant thereupon entered into and filed the following undertaking:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING AN EQUITY COURT

HENRY O. HOUGHTON ET AL., *Complainants*, *vs.* HENRY C. PAYNE, *Postmaster-General, Defendant.* } No. 23342, Equity Docket.

George H. Mifflin, one of the complainants, and the American Surety Company of New York, surety, hereby undertake to make good to the defendant all damages by him suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above-entitled cause, and stipulate that the damages may be ascertained in such manner as the justice shall direct, and that, on dissolving the injunction, he may give judgment thereon against the principal and sureties for said damages in the decree itself dissolving the injunction.

GEORGE H. MIFFLIN.
AMERICAN SURETY COMPANY, NEW YORK

By JNO. S. LOUD.
Approved 4 June, 1902.
A. B. HAGNER.

February 24, 1903, there was a hearing on the merits, and on March 10, 1903, a permanent injunction was granted and the following decree entered:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

HENRY O. HOUGHTON AND OTHERS, *Complainants*, *vs.* HENRY C. PAYNE, *Postmaster-General.*	In Equity. No. 25342.

This cause, coming on to be heard upon the bill and the exhibits filed therewith, and on the papers filed in the cause and the proceedings had therein, was argued by counsel. On consideration thereof it is this 10th day of March, 1903, adjudged, ordered, and decreed —

(1.) That the complainants are entitled to have their publications entitled "Riverside Literature Series" received and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879.

(2.) That the Postmaster-General be, and he is hereby, perpetually restrained from enforcing and continuing the cancellation of the certificate of entry set forth in paragraph six of said bill, and from refusing to receive said publication and transmit the same through the mails as mailable matter of the second class, in accordance with the provisions of said act of Congress approved March 3, 1879, and from denying to the complainants the receipt, entry, and transmission through the mails of their publication entitled "Riverside Literature Series" as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879.

(3.) That the complainants do recover of the defendant their costs incurred in this suit, and may have execution therefor according to law.

A. B. HAGNER,
Associate Justice.

And the defendant in open court, by direction of the Post Office Department and acting under that direction, prays an appeal to the Court of Appeals, which is hereby allowed.

A. B. HAGNER.

This final decree ended the preliminary injunction or restraining order for which the only undertaking was ever given.

"Such orders are of a preliminary nature and are in-
"tended only for *ad interim* purposes, and whether such
"order shall be passed in any case is a matter within the
"discretion of the court to which application is made
"for an injunction. The statute provides, 'But upon
"'motion for an injunction, the court or judge thereof
"'may, if there appear to be danger of irreparable injury
"'from delay, grant an order restraining the act sought
"'to be enjoined until the decision upon the motion, and
"'such order may be granted with or without security,
"'in the discretion of the court or judge.'" (Rev. St. U. S. sec. 718).

Elec. Light Co. *v.* Ross, 9 App. D. C. 558, 560 (1896).

"An injunction which has been granted upon an "interlocutory application is superseded by the decree "made at the hearing of the cause. If therefore, it is "intended that it shall remain in force it must be ex- "pressly continued."

Dan. Ch. Prac. 6th Am. ed. 1680.

In the case at bar, the preliminary injunction or restraining order was superseded by the decree made at the hearing of the cause, and with that decision the office and sole function of the temporary injunction ceased and was no longer operative.

The preliminary injunction or restraining order was by its terms to continue only "until further order to "be made, if at all, after a hearing." It was never dissolved. It expired by its own limitation.

Sweeney *v.* Hanley, 126 Fed. Rep. 97, 99 (1903) (Cir. Ct. of App. 9th Cir.)

The injunction which was dissolved was the injunction of March 10, 1903, and for this injunction no bond was ever given or asked for.

Had the defendant desired security, the matter should have been brought to the attention of the court.

Cayuga Bridge Co. *v.* Magee, 2 Paige (N. Y.), 116.

The court cannot impose on the plaintiffs any undertaking which they have not given. The plaintiffs may decline the injunction by refusing to give the under-

taking. The court only makes the undertaking a condition of granting the injunction. If the plaintiffs refuse to give it, the court can refuse the injunction, but it cannot compel the plaintiffs to give an undertaking.

Tucker *v.* New Brunswick Trading Co. 44 Ch. D. 249.

An undertaking given by plaintiff on the issuing of a restraining order may be continued in effect after the hearing, with the consent of the plaintiff, but not otherwise.

Novello *v.* James, 5 De G. M. & G. 876.

The only undertaking the plaintiffs entered into was on account of "suing out the injunction in the above "entitled cause" (Record, page 28), i. e., the injunction then existing which by its terms was to continue only "until further order, to be made, if at all, after hearing, "which is fixed for the 16th day of June at ten o'clock "a. m., 1902." (Record, page 7.)

When the order of the court was made, after hearing, this preliminary injunction ended by its own limitation.

Whatever may have been the reason the Government's attorney did not ask for a bond when the injunction was issued on final decree, it is certainly no answer to say, as was said by the Court of Appeals to the objection that the court cannot now impose on the plaintiffs an undertaking they have not given, that the defendant "would, had any question been raised, have

"asked for a new bond, in which event the appellees "(the plaintiffs) doubtless would have conceded that "the bond remained in force." (Record, page 35.)

On the contrary, it is quite as probable that if the Department had insisted on a bond to await the event of the suit the plaintiffs would have refused to give it as the price of the injunction. It is also quite as probable that had the plaintiffs refused to give the bond as the price of the injunction, the Department would have waived it, as the Department was quite as desirous as the plaintiffs of having the questions at issue passed upon by the court of last resort, which at that stage of the proceedings could only be accomplished by an appeal by the plaintiffs.

It is confidently asserted that no case can be found where an undertaking given for a preliminary injunction has been continued in force without the consent of the plaintiff after the issue of a permanent injunction.

The case of Dodge *v.* Cohen, 14 App. C. 582, was originally cited by the plaintiffs before Justice Anderson in the trial court, and accepted by him as showing the law and the practice in the District of Columbia, where a permanent injunction followed a preliminary injunction, viz.: that the preliminary injunction and bond expired on the issue of the permanent injunction and a new bond is required for the permanent injunction.

In this case the bill was filed July 18, 1893. A restraining order was passed by the court to be of force "until further order, to be made, if at all, after a hear-

"ing which is fixed for the 25th of July, 1893." The case came on for hearing, and on August 10, 1893, the court granted an injunction, and it was ordered "that "the complainants in this cause (Dodge Bros.) shall file "the usual undertaking with surety, to be approved by "this court, on the issuing of an injunction under rule "40 (now 42) of the equity rules of this court, and for "costs of this suit; this order to take effect upon the "filing and approval of this undertaking."

In obedience to the order of the court of August 10, 1893, the complainants filed the undertaking required, and it was approved by the court August 21, 1893.

The bond which was enforced in this case was the bond filed in compliance with the last-named order, and applied to the permanent injunction only.

The first bond given on the issue of the restraining order, which ceased by its terms, as in the case at bar, when the new order was made after hearing, was not the bond which was enforced. The restraining order had ceased and its bond could not be extended beyond the life of the restraining order, and it was not attempted.

HOLMES CONRAD.
WILLIAM S. HALL.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

HENRY O. HOUGHTON, TRUSTEE, ET AL., appellants,
v.
GEORGE VON L. MEYER, POSTMASTER-General, appellee.
} No. 49.

BRIEF FOR THE APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from the Court of Appeals of the District of Columbia. The decree appealed from reversed so much of a decree of the District Supreme Court as denied, upon the dismissal of a bill and the dissolution of an injunction, a motion for the ascertainment of damages under an injunction undertaking, which it also annulled.

The case originated in a bill filed against the Postmaster-General to compel him to enter and transmit publications of the appellants as second-class matter by means of an injunction restraining him from refusing to transmit them at that rate.

In the Houghton case, the publication, the "Riverside Literature Series," had been (improperly as it turns out) transported for some years at the second-class rate.

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On May 5, 1902, after due hearing in the Post-Office Department, the complainants were notified that thereafter their publication would be excluded from the second-class rate, which is 1 cent per pound, and would be charged at the third-class rate, which is 1 cent for each 2 ounces or fraction thereof. On May 22, 1902, at the request of complainants, the date of such exclusion was extended to May 31. On that date, instead of complying with the order, the complainants filed a bill for an injunction to restrain the exclusion, and a restraining order in accordance with the prayer of the bill was issued, upon the complainants giving an undertaking, as required by Equity Rule 42.

On March 10, 1903, the case came on to be heard upon bill and answer, and the injunction was made perpetual. An appeal was taken to the Court of Appeals, which, on June 5, 1903, reversed the decree appealed from and remanded the cause to the court below, with direction to dismiss the bill. (22 App. D. C., 234, 250.) From that decree the complainants appealed to the Supreme Court of the United States, and a bond was allowed to act as a supersedeas and a continuance of the injunction pending appeal.

The cause came on to be argued here in connection with other cases involving the same subject-matter, and on April 11, 1904, the decree of the Court of Appeals was affirmed by this court. (194 U. S., 88.) Upon receipt of this court's mandate of affirmance, the Court of Appeals thereupon issued its mandate in accordance with its decree reversing the original decree of the court below and directing that court to

dismiss the bill. (Rec., 23, 24.) From the filing of that mandate the complainants began for the first time to pay the third-class rate.

The succeeding Postmaster-General, being substituted for the former Postmaster-General, moved the court below to enter a decree upon the mandate of the Court of Appeals and to dismiss the bill, dissolve the injunction, and ascertain the damages suffered by the defendant by reason of the suing out thereof. (Rec., 24, 25.)

From May 31, 1902, the date of the injunction, to June 16, 1904, the date when the complainants, upon the issuance of the mandate of this court, began to pay the third-class rate, the mailings of the "Riverside Literature Series," at Boston, Mass., amounted to 98,298 pounds, the postage paid thereon at the second-class rate to $982.88, the postage due thereon at the third-class rate to $7,863.84. The difference between the postage at the second-class rate and at the third-class rate, which, but for the injunction, would have been charged during the period in which the Postmaster-General was restrained, amounted therefore to $6,880.86. The complainants having admitted the correctness of this statement of the mailings and the postage due thereon, a stipulation was made that the account might be taken as equivalent to all intents and purposes to a finding of fact of the Auditor to the same effect upon a reference to ascertain the damages suffered by the defendant, the question whether such damages should be recovered being reserved for the determination of the court. (Rec., 29, 30.)

The District Court, however, although it entered a decree reversing and setting aside its original decree and dismissed the bill and dissolved the injunction, held, nevertheless, that the complainants and the surety on the injunction undertaking were not, as matter of law, liable in damages thereon, and accordingly denied the motion for the ascertainment of damages and canceled and annulled the injunction undertaking. (Rec., 25.) From that portion of the decree the defendant then appealed to the Court of Appeals, which reversed the court below and directed it to enter a decree against the appellants and the surety on the injunction bond for the sum of $6,880.86, agreed upon in the stipulation, with interest from July 7, 1905. See opinion in Record at page 31. (*Cortelyou* v. *Payne*, 127. App. D. C., 188.)

ARGUMENT.

When a bill for an injunction is dismissed and the injunction dissolved, the defendant is entitled, as matter of right, to a reference to ascertain the damages. In the normal case dissolution of the injunction necessarily imports that damages are to be paid, for damages must, in the nature of things, result if the defendant is restrained from doing what he has a right to do. The assessment of such damages, therefore, follows, as a necessary incident and consequence of the final result of the cause.

High, Injunctions, § 1649, 1670.

The only question is, then, what damages, if any, have resulted.

Now, in these cases, it is admitted that the Postmaster-General was prevented by the direct operation of the injunction from collecting postage to the amount of $6,880.60. It is admitted that that result was the necessary and inevitable consequence of the granting of the injunction. More than that, it is admitted that it was the result actually intended. The declared object of the bill in each case was to prevent the Postmaster-General from charging the higher postage rate and to compel the transmission of the complainants' publication at the lower postage rate. In other words, the very purpose of the suit was to prevent the collection of the difference between the two rates. What the complainants gained by their injunction was the nonpayment of that difference, and what the Postmaster-General lost by the injunction was the collection of that difference. It would in fact be difficult, if not impossible, to conceive any case of injunction in which the damages suffered could be more direct, immediate, and inevitable than the loss of the difference in postage in these cases.

To reimburse the Postmaster-General out of the injunction undertaking the money thus actually taken from him by the injunction would seem but a natural and necessary consequence of the decree dissolving that injunction.

This substantial and obviously equitable result the complainants sought to avoid by means of three highly technical objections: (1) That the damages claimed were not suffered by the defendant or his predecessor, in whose favor the undertaking ran, but by the United States, which was no party to the proceedings. (2) That the undertaking, having been furnished for the preliminary injunction, related exclusively to it, and can not be made to answer the damages, because the temporary injunction terminated with and was superseded by the decree which made it permanent. (3) That because the complainants' bill was dismissed as not having any foundation in law, and not upon any disputed question of fact, it can not properly be said to have been wrongfully and inequitably sued out.

In the Houghton case there is a fourth objection made upon the supposed equitable ground that the complainants, having been unlawfully permitted by the Post-Office Department for a long time to get the benefit of mailing their publications at the lower rate, ought not to be required to make good the postage at the higher rate while they were endeavoring to get a court to reverse the Department's order fixing the lawful rate.

As to these it may be remarked, *in limine*, that the third did not receive the assent even of the court of first instance, being in manifest conflict with *Dodge* v. *Cohen* (14 App., D. C., 582). The Court of Appeals found it impossible to assent to any of the others.

FIRST POINT.

The complainants sued the defendant in his capacity as collector of the postage upon the complainants' publications. In that capacity they enjoined and indemnified him. He is clearly entitled to be made good for what he lost in the same capacity.

The sole object of the injunction, as a precedent to which the undertaking was made in this cause, was to prevent the defendant, as administrator of the postal revenues, from collecting from the complainants the higher postage rate and to restrict him to the lower rate. Against his obvious right, when the claim upon which the injunction was granted breaks down, to recover on the undertaking the difference between the two rates lost in consequence of the injunction, appellants objected that the postage did not belong to the defendant, but to the United States. This was the principal ground upon which Judge Anderson held, "as matter of law," that the complainants were not liable for such damages. This point was also strenuously pressed in the Court of Appeals. See opinion, Rec., p. 36–39. (27 App., p. 196–201.)

Since writing this brief, counsel for the appellee discovers from appellants' brief that they do not appear now to rely upon the point in this court. Inasmuch as they do not formally abandon it, however, and the question is of importance to the Post-Office Department, counsel has ventured to retain his argument on that head by relegating it to an appendix. See Appendix II.

SECOND POINT.

Damages should be assessed for the entire period during which the injunction remained in force, for so long as the injunction remained in operation the undertaking remained in force as a means of indemnity.

The second objection made by appellees is that the undertaking having been furnished for the preliminary injunction related exclusively to it and not to the permanent injunction, and can not be made to answer for damages because the temporary injunction terminated with the issuance of the permanent injunction and was superseded by it. From this argument the appellees seem to draw two conclusions:

(1) That the undertaking being superseded by the original decree of the court below, no damages at all can be assessed upon the mandate of the Court of Appeals reversing that decree.

(2) That no damages can be assessed after the date of the original final decree of the court below.

If the argument leads only to the latter conclusion, then the Court of Appeals is nevertheless right, for the Supreme Court of the District declined to assess damages for any period whatever and annulled the undertaking *in toto*.

Both of these contentions lose sight of the controlling fact that when the decree continuing the injunction was reversed by the Court of Appeals (affirmed by this court) it ceased in law to exist. That mandate and the decree upon it operated to vacate absolutely the decree of the court below continuing the injunction. It became then as if it had never been,

and the situation is simply that of the granting of a preliminary injunction, which turns out to have been wrongfully and inequitably granted and is so adjudged. The defendant is entitled, therefore, to all the difference in postage lost while the injunction was in force.

It is undoubtedly true, as stated by appellees, that an injunction granted upon an interlocutory application is superseded by the decree made at the hearing of the cause. But after reversal the decree really made at the hearing of the cause is the decree which is made upon the mandate of this court. Otherwise you would be giving to a decree reversed the full effect of a decree unreversed.

That this is the true principle will be demonstrated by reversing the conditions. Suppose that, instead of continuing the injunction, Judge Hagner had entered a decree dissolving it and dismissing the bill. This would have carried with it as a necessary incident the right to an assessment of damages. But if such decree had been reversed on appeal, would it not be clear that the adjudications made by it and the consequent right to damages must fall to the ground, and that the only effective decree in the case be that made in conformity with the mandate of this court? It is for the same reason that an action can not be maintained on an injunction bond until after final determination of the suit, although the injunction may have been dissolved. (*Gray* v. *Veirs*, 33 Md., 159, 160.)

So here the adjudications made by the decree of March 10, 1903, fall to the ground. That decree re-

versed becomes as if it had never been. We are dealing simply with a preliminary injunction which at final hearing is dissolved.

The vice in appellees' argument to the contrary consists in ignoring the fact that the suit and the appeal are one proceeding. (*Garritty* v. *Chicago, etc., R. R.*, 22 Ill. App., 404.)

That case illustrates the principle. A decree of the Circuit Court granting a perpetual injunction was affirmed by the Appellate Court, but afterwards reversed on appeal by the Supreme Court. It was held, nevertheless, that the Circuit Court should assess damages.

The objection made by appellees was urged in *Dodge* v. *Cohen* (14 App., D. C., 582), and was overruled and the contrary has since been the settled law and practice of the District. That was a creditor's bill seeking an injunction against the levying of certain executions as constituting voluntary assignments. The bill was filed July 18, 1893, and a restraining order issued in the common form until further order, to be made, if at all, after hearing, which was fixed for the 25th day of July, 1893. The defendant answered, and the case came on for hearing, and on August 10, 1893, the court passed an order restraining and enjoining the marshal from disposing of the goods and directing them to be turned over to receivers, conditioned upon giving an undertaking under Equity Rule 42. On March 23, 1897, a final decree was passed declaring the judgments and executions attacked to be volun-

tary assignments and ordering distribution. From that decree the judgment creditors appealed. The decree of March 23, 1897, was reversed in the Court of Appeals, and upon the going down of the mandate the cause was referred to the auditor to report damages. To his report there were two principal objections: (1) That the court below could not assess damages upon the mandate, but only proceed to dismiss the bill. (2) That damages could not be assessed from August 10, 1893, down to the date when the damages should be paid under the decree or the mandate, but only to March 23, 1897, the date of the original final hearing. (14 App., at p. 593.)

The Court of Appeals decided both of these propositions in the negative. (1) It held that the thing which determined the assessment of damages was the final result of the cause, and the final result was not the original decree appealed from, but the decree of October 10, 1898, passed after the reference pursuance of the mandate of reversal. (14 App., 596.) (2) It also held, laying down the principle for which we contend, that "as long as the injunction remained in operation, the undertaking remained in force as a means of indemnity." The injunction of August 10, 1893, not being dissolved, but continued by the decree of March 23, 1897, remained in force until it was ultimately dissolved as an incident of the dismissal of the bill under the mandate from the Court of Appeals reversing the decree of March 23. The auditor was therefore right in giving damages

for the period subsequent to the original final decree of the court below and down to that final decree, which was the result of the mandate. (14 App., 597.)

Inasmuch as counsel for appellees seem to have misapprehended some of the phraseology of the decision in this case, the especial attention of the court is invited to the statement of the facts in that case and to the record itself.

So here the injunction remained in force by its own operation until the decision of the Court of Appeals directing the bill to be dismissed, which decree, however, was immediately suspended upon the application of complainants and the original injunction continued in force until the final decree of the Supreme Court of the United States. The life of the injunction then is from the date of its original issuance to the date of the dismissal of the bill, by which its unlawfulness was determined.

This is not affected in anywise by the fact that on the appeal from the Court of Appeals to the Supreme Court of the United States the complainants gave bond to act as a supersedeas and a continuance of the injunction. The security of such a bond is merely cumulative. The precise point was before the Court of Appeals of Maryland in *Hamilton* v. *State use of Hardesty* (32 Md., 348, 353). To the contention that the appeal bond in such a case is exclusively liable, it was answered by Alvey, J., delivering the opinion of the court:

> Taking the appeal and giving the appeal bond as required by law had the effect of stay-

ing and suspending the operation of the order of dissolution, and of leaving the order granting the injunction in full force as if no order dissolving the injunction had passed. The defendant in those proceedings was not at liberty to proceed with the foreclosure of his mortgage or the collection of his rents during the pendency of the appeal, nor could he have sued the injunction bond after the order of dissolution and before its affirmance by the Court of Appeals; for, after filing the appeal bond, and by that means staying and suspending the effect of the order of dissolution, the injunction was as operative as ever. * * * And, though the appeal bond was conditioned to prosecute the appeal with effect, and by breach of which the appellee became entitled to recover damages sustained by reason of the appeal, it is but *cumulative security* to the injunction bond *except* as to the *costs* on the appeal to which the appeal bond alone is chargeable. (*Hamilton* v. *State use of Hardesty*, 32 Md., at 353, 354.)

THIRD POINT.

Complainant's injunctions, being dissolved for want of right and equity to sustain them, are conclusively determined to have been wrongfully and inequitably sued out.

Appellants' third contention is that they are not liable on their undertaking because they did not bring their bill maliciously and in bad faith. Because their bill was dismissed for want of right to sustain it, and not because of any dispute as to the facts, they insist

that it was not "wrongfully and inequitably sued out." In other words, they seem to think that the term "wrongfully and inequitably sued out" imports something more than mere unlawfulness of and want of equity in the complainants' case.

This contention failed to receive the assent of the court below. The same contention made under similar circumstances was also overruled by the Court of Appeals in *Dodge* v. *Cohen* (*supra*). In that case this court had before it the same rule of court and the same form of undertaking as in this case. It expressly decided that the meaning and effect of the undertaking is that the complainant must make good the loss occasioned by his injunction whenever he fails to establish the right by the claim of which he has obtained the injunction.

> It is contended, however, by the appellants that, under the circumstances of the case, the sale of the property by the marshal under the execution in his hands was not wrongfully and inequitably enjoined, and that no damages should be assessed as occasioned by the injunction. But we perceive no merit in this contention, and clearly there is no substantial justice upon which it can be found. If the property was *illegally and therefore wrongfully* taken out of the custody of the marshal and placed in the hands of receivers for sale, whereby great loss was occasioned to the execution creditors, there can be no reason or justice for withholding the damages that they have sustained by the injunction. Otherwise there was no sense or reason in requiring the

undertaking to be entered into as a condition upon which the injunction was granted. (*Dodge* v. *Cohen*, 14 App., p. 598.)

Appellants' error consists in confounding the popular with the legal meaning of the terms.

> "'Maliciously,' 'wrongfully,' and 'injure' are words," said Lord Justice Bowen, "which have all accurate meanings known to the law, and which also have a popular and less precise significance * * * 'Wrongfully' imports in turn the infringement of some right." (*Mogul S. S. Co.* v. *McGregor*, L. R., 23 Q. B. D., 598, L. R. H. L., 1892, App. Cas., 25.)

So here the term "wrongfully" has simply the meaning of "illegally," and imports merely that the complainants, having sued out an injunction which the dismissal of their bill shows they were not entitled to, have necessarily infringed that right of defendant the exercise of which was inhibited by the injunction.

The term "inequitable" clearly means "without equitable right" to the relief granted. And every injunction which upon the same state of facts is dissolved, is conclusively shown to have been inequitably granted, because if the complainant had been equitably entitled to the relief it would have been impossible that the bill should have been dismissed or his injunction denied. And on this point the decree that complainant's bill must be dismissed is of course conclusive.

Oelrichs v. *Spain*, 15 Wall., 211, 228, 229.
Hopkins v. *State*, 53 Md., 502, 517.
Sipe v. *Holladay*, 62 Ind., 4, 9.

Our rule 42, framed by Justice Olin, it is well known, had its origin in the Thirty-first New York Chancery Rule, framed by Chancellor Walworth (N. Y. Chan. Rules, ed. 1844, p. 40).

Chancery Rule 31 was crystallized into law in New York and has been adopted in New Jersey and other States.

New York Code Civ. Proc., 1848, sec. 195; 1852, sec. 222; 1877, sec. 620, 623.

New Jersey Equity Rule 42; 15 N. J. Eq., 522.

In a well-considered decision in New Jersey upon their chancery rule, in answer to the same contention that the words "not equitably entitled" meant something more than a mere lack of right in the complainant and permitted an inquiry into the circumstances of his fairness, probable cause, and good faith, it was decided that the words meant merely an absence of equitable right to the relief prayed, and that a decree dismissing the bill necessarily decided that the complainant had no such equitable right, and operated as a forfeiture of the bond. (*N. Y. & L. B. R. R.* v. *Dennis*, 40 N. J. Eq., 340, 359, 360, 362.)

It is immaterial whether the injunction was granted by mistake of law or upon a misapprehension or misstatements of the facts. The defendant is entitled to the protection of the undertaking whenever and for whatever reason the complainant actually fails on the merits. *Smith* v. *Day*, the only case to the contrary effect cited by appellees, is expressly overruled by

Griffith v. *Blake*, L. R., 27 Ch. D., 474, 476, 477.

Huni v. *Hunt*, 54 L. J. Ch. (N. S.), 289, 290.

Complainants' contention would in truth nullify the undertaking altogether. It would leave the defendant in precisely the same situation as if no undertaking whatever had been given. For the defendant always, independently of any undertaking, could hold the complainant liable for suing out an injunction in bad faith and without probable cause. But the whole purpose of the modern practice requiring an undertaking is to give the defendant something better than that. Its object is to prevent the complainant from obtaining, by mistake as to the law or a misapprehension of the facts, however honest, a benefit at the expense of the defendant. It proceeds upon the principle that the court, as a condition of lending the aid of this extraordinary writ, will see that the defendant is to be indemnified and saved harmless from the injurious consequences of the injunction should it turn out in the end that the right was with the defendant. The complainants' liability is a new and different liability existing by force of the undertaking, whereas the appellants would have us believe that it is merely the same old liability for bad faith and want of probable cause which would exist if there were no undertaking at all.

Russell v. *Farley*, 105 U. S., 433, 438, 439.

Cox v. *Taylor's Administrator*, 10 B. Monroe, 17, 21, 22.

Winslow v. *Mulchay*, 35 S. W., 762, 763.

N. Y. & L. B. R. R. v. *Dennis*, 40 N. J. L., 340.

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FOURTH POINT.

There is no just cause for relieving the complainants from the natural effect of their undertakings.

We freely concede the power of the court to mitigate terms imposed as a condition of granting an injunction, or to relieve from them altogether, whenever it appears that it would be inequitable or oppressive to continue them. The very same case, however, which is the main authority for the power contains a warning that it is to be exercised with caution. (*Russell* v. *Farley*, 105 U. S., 343, at p. 442.)

While asserting in general terms the power to release the pledge or bond required as a condition of granting the injunction, this court adds for obvious reasons that where it is security for a debt or a balance of account or other money demand, *this would rarely be allowable.* (105 U. S., 442.)

Now, the security of the undertaking in these cases was given precisely to cover a balance of account. It had no other purpose or function than to stand as a means of indemnity for that loss of postage which the injunction was expressly designed to inflict. The sole purpose of the bill was to deprive the Postmaster-General of the difference between the lower and the higher rate and to gain that advantage for the complainant. Inasmuch as the complainants actually had the benefit of that difference from the moment of filing their bill it is difficult to see upon what principle of equity or justice they

should be relieved from the obligation of the undertaking upon the strength of which they were enabled to gain the benefit.

In truth, the only ground upon which they urge that they should not be held to it is because they had been, for a great number of years, erroneously and advantageously permitted to transmit their publications at the lower rate—a singular ground upon which to base an equity. The mistake was in their favor; they had the benefit of it for years, and it put thousands of dollars into their pockets. The equities are in truth the other way, and this court has so decided. In answering the contention of the appellants that the court, upon the authority of the *United States* v. *Alabama Railroad Company* (142 U. S., 615, 621), and similar cases, should adopt the original interpretation, and look with disfavor upon the change because of the publishers' supposed equities, the Supreme Court said:

> It was said in that case that the construction is one which, though inconsistent with the literalism of the act, certainly consorted with the equities of the case. Whereas in the case under consideration, if we were to believe the statements of counsel, which are not denied, the carriage of these publications as second-class matter entails annually an enormous loss upon the Government and constitutes an odious discrimination between publishers of books and publishers of the so-called periodicals. (*Houghton* v. *Payne*, 194 U. S., at p. 99.)

Again:

> Some consideration in connection with the ratification of these certificates may properly be accorded to the great expenses occasioned by this interpretation and the discrimination in favor of certain publishers and against others, to which allusion has already been made. (Ibid., at p. 100.)

Nobody is trying to take away from the complainants benefits which they received under the old interpretation. As this court said: "Much less is any repayment demanded of money paid by the Government under the prior construction." But the benefits which they secured at our expense, and which we claim they should refund to us, were all secured subsequent to the lawful adjudication of the Post-Office Department that *in the future* they were not entitled to the lower rate. That adjudication was made after a full and impartial hearing and the execution of it had been postponed at the complainants' request until May 31, 1902.

With that adjudication in their face, the complainants came into court praying an injunction, based upon a claimed legal right to the lower, the second-class rate. They sought equitable relief as a means of securing that supposed legal right and gave an undertaking as the condition of the granting of that relief. It was for them to show that they had the legal right on which they relied. But it is solemnly adjudged that they have not and never had such legal right.

In seeking to reverse by a wholly collateral proceeding the action of the Postmaster-General, they presented to the court the question whether their publication constituted a periodical and was matter of the second class. But the Court of Appeals answered: "WE THINK THERE IS BUT ONE REASONABLE ANSWER TO THIS QUESTION, AND THAT HAS BEEN GIVEN BY THE POSTMASTER-GENERAL." (*Payne* v. *Houghton*, 22 App. D. C., 234 at p. 246.)

Meanwhile the defendant has been restrained and prohibited from exercising his legal right and performing his legal duty to charge the true rate. The mere assertion of a right which had no existence, supported by an undertaking to make the assertion good, has put into the pockets of the complainants $6,888.86, which otherwise would have been collected by the defendant.

And now the complainant would have the undertaking which made all this possible declared a mere nullity. Surely this is a case in which (to use the language of an eminent English judge) it would be manifestly unjust to disregard and not give effect to the undertaking which was the *price* of the injunction.

Not only would it be unjust to the defendant, but it would work that odious discrimination in favor of certain publishers as against others alluded to by this Court.

In *Smith* v. *Payne* (22 App. D. C., 463), which was decided by this court, upon the authority of

Houghton v. *Payne*, as not distinguishable, and was argued and decided at the same time with it in the Supreme Court (194 U. S., 104), the complainants, in common with the great body of publishers in like situation, paid the third-class rate upon their excluded publications from the date of the order of exclusion and during the entire period in which the Postmaster-General was enjoined in the Houghton case upon the strength of the undertaking. It would surely be an odious discrimination in favor of the Houghtons to nullify their undertaking and permit them to mail their publications at one-eighth of the cost actually paid during the same period by their rivals and competitors.

If the undertaking is stricken down, there is no remedy to recover the postage, for in the absence of an undertaking the damages arising from the act of the court itself are *damnum absque injuria*.

> *Russell* v. *Farley*, 105 U. S., 433 at p. 438; 15 Wall., 211.

There is absolutely no equitable consideration in this case which will relieve the complainants from the obligation imposed by their own undertaking. No new facts have supervened which were not known to the complainants at the time. In each case no new developments have occurred which would make it unjust to hold them to the conditions upon which they obtained their relief at the outset. In each case it was perfectly well known to the complainants that the result of granting the injunction

would be the very state of things that has happened—that the Postmaster-General would be prevented from getting the full rate and that they would gain and he would lose the difference. *The damages which have resulted are not only the natural and inevitable result of their action, but the result actually in their contemplation and which they deliberately intended to produce.*

It is respectfully submitted the decree appealed from should be affirmed.

HENRY H. GLASSIE,
Special Assistant to the Attorney-General.

APPENDIX No. 1.

EQUITY RULE 42 OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INJUNCTION.

42. No injunction or restraining order to suspend the ordinary business of a bank or a moneyed corporation, or to compel a defendant to refrain from doing any act where the injunction will necessarily produce great or irreparable injury to such defendant if the claim of the complainant be not sustained, shall be allowed except upon a direct application to the justice holding the equity court.

Except when an injunction is to stay proceedings in an ordinary suit at law, or is against a judgment debtor who is made a defendant to a creditors' bill, no injunction or restraining order shall be issued except upon the precedent condition that the complainant execute and file in the cause (with surety or sureties if deemed necessary by the justice and to be approved by him) an undertaking *to make good to the defendant all damages by him suffered or sustained by reason of wrongfully and inequitably suing out the injunction and stipulating that the damages may be ascertained in such manner as the justice shall direct, and that on dissolving the injunction he may give judgment thereon against the principal and sureties for said damages in the decree itself dissolving the injunction.*

APPENDIX No. 2.

FIRST POINT.

The complainants sued the defendant in his capacity as collector of the postage upon the complainants' publications. In that capacity they enjoined and indemnified him. He is clearly entitled to be made good for what he lost in the same capacity.

I.

The complainants brought their bills against the Postmaster-General, because as Postmaster-General it was his duty and right to collect the lawful postage upon their publications. The relief sought against him was that he should be prevented from collecting the higher rate of postage and restricted to the collection of the lower rate of postage. The court granted that relief, but upon the condition that the complainants should make good the consequence of it. The only consequence which did, which could, or which was intended to flow from it was to prevent the Postmaster-General from collecting the difference in postage.

Why, then, should not the defendant, *acting in the same capacity in which he was sued, and in which he was enjoined*, be entitled to recover from the complainants what he *lost* and what they *gained* by reason of the injunction? The only answer which the appellees can pretend to make is that although the defendant was prevented from collecting the postage,

the postage is not his private property, but ultimately goes to the United States, and the doctrine upon which they seek to justify this extraordinary gap between the Postmaster-General enjoined and the Postmaster-General indemnified is the doctrine of *Belknap* v. *Schild* (161 U. S., 10) and the cases following it.

But the least consideration will show that the doctrine of *Belknap* v. *Schild* has simply no application.

That doctrine is the perfectly settled one that "no suit can be maintained against the United States or against their property in any court without the express authority of Congress." The Belknap case was a suit brought by a patentee in which, upon the ground of infringement, he sought to enjoin the use of a caisson gate in the Mare Island Navy-Yard, and to compel the gate itself to be destroyed or delivered up. The gate was the property of the United States and was in its possession, the officers sued having mere charge or custody of it, and the United States was not a party to the suit.

The point actually decided in that case was that, in a suit against officers of the United States, to which, however, the United States is not a party, the court will not assume jurisdiction to destroy, remove, or interfere by injunction with the use of physical objects, which happen to be in the custody of such officers, but are actually the property of the United States, held and used by it for the public benefit. And the ground of the decision, as succinctly restated in the

subsequent case of the *International Postal Supply Company* v. *Bruce*, is—

> The proposition, which was made the turning point in the case, that the court could not interfere with an object of property, unless it had before it the person entitled to the thing; and this proposition was held to extend to an injunction against the use of the thing, as well as to a destruction of it, or a removal of the part which infringed. (*International Postal Supply Company* v. *Bruce*, 194 U. S., 601, 605.)

In this latter case, as in Belknap's, the United States had "a property or right *in rem* in the machines which, though less extensive than absolute ownership, was the incident of the right to use them while it lasts. This right can not be interfered with behind its back, and as it can not be made a party this suit, like that of *Belknap* v. *Schild*, must fail." (194 U. S., 606.)

But in the case at bar we are not dealing with the property or the property rights of the United States. There is no question whether the court will assume jurisdiction over things in which the United States has some right *in rem*. There is no question about jurisdiction at all. On the contrary, the court has already, upon principles settled since *Marbury* v. *Madison* and *Kendall* v. *Stokes*, assumed jurisdiction and exercised it. The defendant, in his capacity as collector and administrator of the postal revenue, was about to charge a certain rate, which the complainants said was contrary to a plain law, and the court, in the exercise of its undoubted jurisdiction to prevent such a violation

of law, stopped him from charging that rate, requiring at the same time that the complainants should undertake to make good the consequences should their complaint turn out to be groundless. The complaint has turned out to be groundless. The rate which the Postmaster-General was about to charge is solemnly decided to be the true and lawful rate. The undertaking upon which the complainants secured the stoppage of the action was an undertaking to the court, given in order that the court might do justice between the parties, if, for any reason, the court eventually should come to the conclusion that the injunction, which has been granted, ought not to have been granted. The court has reached the conclusion that the injunction granted ought not to have been granted, and the defendant asks merely that the complainants shall restore what they have received upon the strength of that undertaking. The United States, as a legal entity, has nothing to do with it. It will not do for the complainants themselves to drag the United States into the case for the purpose of saying to the defendant: "This money is not your money. It is the money of the United States. Therefore, although we have prevented you from getting it, we will not return it to you, because ultimately it must go to the United States." *A short answer to this is that the money is not the money of the United States until after it is paid to the defendant, and that it is the duty of the complainants to pay it to the defendant*, and not their business what becomes of it AFTER they have performed that duty. A simple illustration

will suffice to demonstrate this. Suppose that instead of requiring a bond or undertaking, the court, as it might well have done, had required the complainants to deposit in the registry of the court money sufficient to cover the higher rate, could the complainants dispute the power of the court to turn over that money to the defendant Postmaster-General upon the plea that when paid over *it would* go eventually, not to him, but to the United States?

Appellant's argument, if it proved anything, would prove too much. It would prove that not only the court below, but the Court of Appeals and the Supreme Court of the United States, committed palpable and inexcusable error in assuming jurisdiction of this case at all—a case which (it is said) showed upon its face that it was against the United States. For the open and avowed object of the suit was to restrain the collection of postage, and if the payment of that postage cannot now be required, because of the interest of the United States, then, for the same reason, its collection could never have been enjoined.

The fallacy which underlies appellees' entire argument is obvious. It is a fallacy of equivocation. It consists in assuming that although the relief they sought was in law against the defendant, the legal effect of that relief was against the United States; that while the injunction ran against the Postmaster-General, its legal operation was against the United States. And the extraordinary but inevitable consequence of that fallacy is that the *less the right in the complainants, the more irreparable the injury they inflict.*

For the less founded the complainants' case, as being an improper interference with the Postmaster-General in his administrative functions, the more surely, when that interference is seen to be improper, must the Postmaster-General fail to get back what that interference has taken from him. To such straits do clients sometime drive counsel when their proceeding reacts upon the pocket-nerve.

Once we are rid of the fallacy, however, the way is plain enough. These suits were and are against the Postmaster-General. They lay against him under the settled doctrine of this court by reason of his power and duty to charge and collect postage under the laws of Congress. But for the fact that he was vested with that very power and duty they never could have been brought at all.

The injunctions were not precluded from lying by the circumstances that after he had performed that duty the proceeds went into the postal revenues of the United States. Neither can that circumstance now enable the complainants to escape the consequences of their injunctions.

Having been interfered with in his postage-charging capacity and prevented, improperly, as it turns out, from making the true charge, the Postmaster-General asks simply that it may be made good out of the complainants' undertaking in the same capacity in which he was interfered with.

II.

Such an eminently reasonable and equitable claim this court could deny only with reluctance and upon the compulsion of some clear and positive rule of law. But there is no such principle or rule of law. Every settled rule, principle, and analogy is the other way.

A man may always be indemnified in the capacity in which he is damnified.

Whoever heard it asserted that a receiver, trustee, administrator, or agent, against whom an injunction is issued in his representative capacity, could not be indemnified in that capacity, or that he could not recover upon the indemnity simply because in the further execution of his trust he must turn over the proceeds to other parties? It is of no conceivable consequence to the complainants in such cases that the defendant is bound to answer over, any more than it is to the complainants here that the Postmaster-General is bound to account to the United States for postal revenue.

For the proposition that one vested with the control of a fund in a representative capacity may be protected in that capacity and may recover to the full extent of the damage touching the entire fund, it should be sufficient to refer to two leading cases, the first of which is *Oelrichs* v. *Spain* (15 Wall., 211). A bill for injunction was brought by Spain against one Wetmore, with others, as the custodian or trustee of a fund held by him subject to the claims of one Hill and others, to which the complainants asserted

a superior equity. Wetmore was enjoined from dealing with the fund and indemnity bonds given, to which he, but not Hill, was a party. Spain's bill was dismissed. Thereupon a bill was brought against him and his sureties by the executors of Wetmore, "To enforce *in favor of Hill's estate* the liability for damages arising under the injunction bond, and, if need be, to marshal the assets. The executors of Wetmore claimed nothing except in trust for the benefit of Hill's estate." (15 Wall., 227.)

In overruling the objection that the sureties on the bond given to Wetmore could not be made liable for the injuries done Hill's estate, this court said:

> It is true that neither Hill nor his representatives were parties to the bond of May or the bond of Oelrichs, and that they were not named in the writ of injunction upon the filing of the first bond. But Spain's bill averred that Wetmore held the fund in trust for Hill. Wetmore was an obligee in both bonds. The legal title to the entire fund was in him and was never divested. * * * Wetmore, during his lifetime and after his death his legal representatives, might have recovered upon the bonds at law *to the full extent of the damage touching the entire fund*. Such was his and their legal right. (*Oelrichs* v. *Spain*, 15 Wall., 211, 227, 229.)

Here the Postmaster-General is in precisely the same situation as Wetmore's executors. Although he has no personal pecuniary interest in the fund affected by the injunctions, he is the person in whom its collection and superintendence are lodged by law. It is as

the person having such control and superintendence that the complainants enjoin him. As against the complainants, so far as the legal relations between the complainants and the defendant are concerned, he has the legal title to the fund and is entitled to be made good for any diminution which they have caused in it. He is entitled to be made good for the very purpose that he may himself turn it over intact.

The same principle is illustrated in the case of *Andrews* v. *Glenville Woolen Company* (50 N. Y., 282). Judgments were recovered in the name of the Glenville Woolen Company by persons claiming the right to use the name of that company for the purpose. The injunction restrained the defendant company from enforcing the judgments. Complainant gave the usual undertaking. At final hearing the bill was dismissed. On the reference to ascertain damages the complainant objected that the defendant company, having no interest in the result, had sustained no damage, while, on the other hand, the creditors using its name, not having been named as defendants, and the undertaking not being given to them, could not recover upon it. But the court overruled the contention upon the principle that when proceedings conducted for the benefit of one party, but in the name of another, are restrained by injunction not directed against the real party in interest the damage incurred by the real party in interest will, nevertheless, be presumed in law to have been incurred by the defendant of record and may be recovered in his

name for the benefit of the real party in interest. (*Andrews* v. *Glenville Woolen Company*, 50 N. Y., 282, 285.)

III.

Although our argument is in no wise dependent upon it, it will be instructive to observe that in a very special sense the Postmaster-General is the trustee of the postal revenues. These revenues, which are by no means derived from postage alone, are collected under his direction and supervision by the postmasters and other agents of the service. So much of the revenues as are not paid out for salaries and other authorized expenditures directly by the postmasters collecting them, or by those specially designated as disbursing officers, are deposited either in depository post-offices, in designated depositories, or in the Treasury under the direction of the Postmaster-General.

R. S. U. S., secs. 407, 3641, 3861, 3862;
Act July 5, 1884, 1 Supp. R. S., 467; P. L. & R., 113, 116, 117, 120, 383;
Act Jan. 22, 1894, 2 Supp. R. S., 166.

These postal revenues remain a distinct fund and are denominated "deposits." The postal service is maintained out of its own revenues. All expenditures not settled directly by postmasters are made by warrants of the Postmaster-General drawn upon this fund of the postal revenues, and only when the postal revenues are insufficient to meet the current expenses does the Postmaster-General make a requisition upon

the Treasury pursuant to the appropriations provided to meet such deficiencies. The amount is then placed to the credit of the Post-Office Department and transferred by the Postmaster-General to such assistant treasuries as may be necessary. Thus it will be seen that the postal revenues, even after collection, constitute a separate, distinct, and identifiable fund of which the Postmaster-General is the supreme administrator, and which is not only collected but disbursed by him.

It was as administrator or trustee of these revenues that the Postmaster-General was enjoined at the instance of the complainants, upon the theory that he was about to make an unlawful charge which would inure to the benefit of those revenues. Just as the complainants upon that statement of the case were entitled to a remedy against the agent doing the supposed wrongful act, so are they bound to indemnify that agent for the effect of that remedy when the act turns out not to be wrongful at all. It would be contrary to the most elementary principles of justice that the complainants, asserting a right against the defendant in one capacity, could escape the consequences of the assertion of that right upon the plea that because it turns out that their claim of right was unfounded they may insist that they sued the defendant in another capacity. The relief and the indemnity were reciprocal and commensurate. The Postmaster-General was sued in his official capacity; he thereby suffered damage in his official capacity; must he not be made good in his official capacity?

IV.

HAVING REAPED THE BENEFIT OF THEIR UNDERTAKING BY WAY OF POSTAGE, THE COMPLAINANTS ARE ESTOPPED FROM DISPUTING THE OBLIGATION TO REFUND WHAT THEY HAVE THUS RECEIVED.

Even if the legal situation were not as clear as it is, it would not lie in the mouth of the complainants to say that the undertaking was not given to cover the very benefit which they have obtained from it. Upon the theory that the defendant controlled the collection of this postage and upon their solemn undertaking to save him harmless from the consequences of their proposed action, the plaintiffs have obtained, for the period involved in these proceedings, the benefit of mailing their publications for $6,880.86 less than they otherwise would have been compelled to pay. Can they put the $6,880.86 in their pocket and tell the defendant to whistle down the wind? Clearly they are estopped. When a party reaps the benefit which the bond gives in such cases and is called upon to respond, he is not permitted to repudiate the obligation he has assumed. It does not lie in the mouth of one who has affirmed a jurisdiction in a particular manner to accomplish a purpose to afterwards deny such jurisdiction to escape the penalty.

Robertson v. *Smith*, 129 Ind., 427; 15 L. R. A., 273, 275, 276.

George v. *Tate*, 102 U. S., 564, 571.

Daniel v. *Tearney*, 102 U. S., 415, 420, 421.

To the same effect are—

Davis v. *Wakelee*, 156 U. S., 680, 689, 691.
Adams v. *Olive*, 57 Ala., 249.
People v. *Pace*, 57 Ill. App., 674, 677.
Sheffield v. *Robinson*, 30 N. Y. S., 799, 800.
Goodwin v. *Bunzl*, 102 N. Y., 224, 227.
Underhill v. *Spencer*, 25 Kans., 72, 73.

This is so even when the court taking the bond is wholly without jurisdiction and the bond consequently void.

Robertson v. *Smith*, *supra*.
Daniel v. *Tearney*, *supra*.

V.

Some support for the contention that the complainants may escape the consequence of their undertakings is looked for in the cases which announce the rule that at common law, in the absence of legislation, actions against executive officers are regarded as personal and the writ as if directed to the person temporarily occupying the office and not to the office itself.

United States v. *Butterworth*, 169 U. S., 605.
Warner Valley Stock Company v. *Smith*, 165 U. S., 28.

That this is the common-law rule is of course conceded. But to the argument which in these cases is sought to be drawn from it there are two plain answers:

(1) Assuming the common-law rule to remain unaltered, it clearly makes no difference upon the ques-

tion of indemnifying an officer restrained in respect of his official duty that the writ is directed to him personally. That does not deprive him of his right to be indemnified in respect of the same matter as to which he is restrained. In order to indemnify him it is by no means necessary that the writ should be directed against the office. A suit against an agent is directed against the person and not against the office, and the person is clearly liable for disobedience to the writ. But such an agent or trustee may, nevertheless, be indemnified to the whole extent of the injury he suffers in that capacity.

Oelrichs v. *Spain*, 15 Wall., 211, 229.

Andrews v. *Glenville Woollen Company*, 50 N. Y., 282.

The writ of mandamus or injunction goes to secure the performance of a duty resting upon the person, but that does not make the duty any less an official duty which rests upon the person only by virtue of his office. If his hand is stayed in respect of that official duty, he may, in like measure, be made whole in respect of that official duty and be placed in a position to perform it as completely as if he had not been stayed. Being indemnified in the same manner that he is restrained it is of no consequence that, after the duty is performed, he may be answerable over.

(2) But the common-law rule has been altered by statute and the action is no longer strictly personal.

In pursuance of the suggestions made in 1898 by

this court in *United States* v. *Butterworth* (169 U. S., 600, 605) and by the Court of Appeals in *Roberts* v. *Valentine* (13 App., 47) as to the desirability of legislation to cure the inconvenience of the anomalous common-law rule, Congress, in the following year, passed the act of February 8, 1899, chapter 121.

> That no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs. (30 Stat. L., 822; 2 Supp. R. S., p. 940.)

Observe that the act speaks of the suits as brought against the officer in his *official capacity*, and provides that they shall not abate by reason of his separation from *office*, but may be maintained against his *successor in office*.

How absurd, then, to contend in a suit brought against Henry C. Payne, Postmaster-General, for the purpose of controlling the duties of the office of Post-

master-General, whether occupied by him or not, in which suit a bond of indemnity is given the defendant, that the only damages thereby indemnified against are those suffered by Henry C. Payne in his personal and private capacity, in which capacity he is not sued at all.

That the complainants recognized the proceeding to be against the defendant in his official capacity until it became necessary to devise a theory to escape their obligation is conclusively demonstrated by two facts in the record:

(1) That they accepted an answer by the Acting Postmaster-General, a person not named in the writ. (Houghton, Rec., p. 11.)

(2) That the decree they took was a decree against the Postmaster-General by that designation alone, and not against any person: "That the defendant, the Postmaster-General, be, and he hereby is, perpetually restrained." (Houghton, Rec., p. 12; Bates and Guild, Rec., p. 13.)

And this court in its opinion everywhere treats the case as a bill in equity filed "against the Postmaster-General." (*Houghton* v. *Payne*, 194 U. S., 89.)

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